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No. 85 -

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. ARNSBERG,
Petitioner,

v.

UNITED STATES OF AMERICA,
MICHAEL J. MANEY, and NORMAN E. WEILER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Whether the government, and its agents who conduct an investigation leading to issuance of an invalid arrest warrant, who supply misleading facts to procure the invalid warrant, and who later execute the warrant, are entitled to summary judgment, either based on immunity for violation of the Fourth Amendment, or based on the absence of tortious conduct under 28 USC §2680(h).

Whether the United States is entitled to sovereign immunity for conduct outside the powers granted by the constitution.

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RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Robert L. Arnsberg petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App A, infra) is reported at 757 F.2d 971 (9th Cir. 1984). The opinion of the United States District Court for the District of Oregon (App. F, infra) is reported at 549 F. Supp. 55 (D. Or. 1982).

JURISDICTION

The original decision of the Court of Appeals was filed on July 31, 1984 (App. C, infra). The petition for rehearing of the United States was allowed and the former decision withdrawn on December 3, 1984 (App. E, infra). The opinion on rehearing was filed April 9, 1985 (App. A, infra). The petition of Robert L. Arnsberg for rehearing and rehearing en banc was denied on May 30, 1985 (App. B, infra). Judgment on rehearing was entered on June 10, 1985 (App. D, infra). The jurisdiction of this court is invoked under 28 USC §1254.

STATEMENT

Petitioner Robert L. Arnsberg was arrested by respondents Michael J. Maney and Norman E. Weiler after issuance of an invalid warrant. Maney and Weiler (hereinafter "the agents") were employed as special agents of the Internal Revenue Service (CR 29, p 37).*

The arrest was the culmination of the agents' efforts to secure the testimony of Robert L. Arnsberg before a grand jury investigating the wagering and tax affairs of other individuals. Arnsberg had never been served with a subpoena. In response to an interrogatory, the agents stated "[A]gents are instructed that subpoenas require personal service unless the person subpoenaed agrees to substituted service" (CR 17, Defendant's Answers to Plaintiff's First Interrogatories, p. 1). The agents' job description requires that they know the law governing their conduct (App. H, infra). The agents nevertheless arrested Arnsberg and claimed to rely on an arrest warrant for "failure to appear before a Federal Grand Jury" (App. K, infra).

Arnsberg was a lifelong Portland

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* "CR" refers to the Clerk's Record from the District Court.

resident (CR 55, p. 27). He had never been arrested (CR 62, Tr. p. 67). He had been in the grocery business 12 years (CR 55, p. 2). He was at his place of business nearly every day (CR 55, pp. 42, 43). Arnsberg never attempted to evade service, but because of the inconvenience of testifying, he insisted that his attendance be required (CR 55, pp. 9, 11, 42, 43; CR 17 Arnsberg Aff; App. N, infra). The agents made one unsuccessful attempt to serve Arnsberg at each of his two stores and left a copy of the subpoena at each store (CR 29, p. 38; CR 55, pp. 2-3). Arnsberg's attorneys advised him that he was not required to respond unless a subpoena was personally served on him (CR 55, pp. 23, 26). Arnsberg remained ready to comply with a validly served subpoena (CR 17, Arnsberg Aff; App. N, infra).

In spite of the fact that Arnsberg had never been served, the agents swore out an affidavit alleging "that Arnsberg did not

appear before the Federal Grand Jury on February 26, 1980" (App. J, infra) as if he had failed to meet an obligation.

A warrant (App. K, infra) then was issued which stated the "offense charged" was "failure to appear before the Federal Grand Jury", but near the bottom of the form cited 18 U.S.C. §3149, then the material witness statute. (18 U.S.C. §3149 was repealed in 1984 and replaced by the present 18 U.S.C. §3144 which is materially the same as the former section 3149.)

On February 27, 1980, Arnsberg received a call from the agents who informed him they wanted to meet with him and that "you're asking for a lot of trouble" (CR 17, Arnsberg Aff., p. 3). The agents abruptly hung up. Arnsberg then called the agents' office and left a message that he was at one of his stores and waited (CR 17, Arnsberg Aff., p. 3). The agents arrived and instead of serving him with process, announced that

Arnsberg was under arrest, searched him, kicked his legs apart, handcuffed him, marched him through the store in front of his customers and transported him to the courthouse (CR 17, Arnsberg Aff., p. 3; CR 55, pp. 46, 48, 50).

Arnsberg was taken before a Magistrate and was released on his own recognizance at the suggestion of the prosecutor (App. O, infra). Subsequently, Arnsberg moved to have the arrest warrant quashed on the ground that it was unsupported by probable cause (CR 17, U. S. v. Arnsberg, Court file, Motion to Quash and Memo in Support of Motion to Quash). The motion was granted (CR 17, U. S. v. Arnsberg, Court file, Order). Arnsberg then filed this action to recover his damages.

Arnsberg's action in the United States District Court for the District of Oregon was based upon the Federal Tort Claims Act, 28 USC §§1346(b), 2401(b), 2671-2680 (1982) and

violation of the Fourth Amendment of the United States Constitution under Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). Jurisdiction was also based on 28 U.S.C. §1331.

The District Court granted summary judgment in favor of Arnsberg on one of his Federal Tort Claims Act claims against the United States and granted summary judgment in favor of respondents on the Bivens claims. After a trial on damages, the District Court awarded Arnsberg $6,650.00 against the United States.

The United States appealed, and Arnsberg Cross-Appealed.

The Court of Appeals, in its original opinion, reversed the summary judgment in favor of Arnsberg on his Federal Tort Claims Act claims, holding that the liability of the United States was dependent upon whether the agents had acted tortiously, and held the agents had not acted tortiously. The Court

of Appeals affirmed the District Court's summary judgment in favor of the United States on Arnsberg's Bivens claim, holding that a Bivens action may not be maintained against the government itself. The Court of Appeals reversed summary judgment granted in favor of the agents on Arnsberg's Bivens claim, holding that a question of fact existed as to the good faith qualified immunity of the agents.

On rehearing, the Court of Appeals withdrew its prior opinion and substituted an opinion which was identical to its first opinion, except that the Court of Appeals now affirmed the District Court's grant of summary judgment in favor of the agents on Arnsberg's Bivens claim, holding that the agents were entitled to immunity as a matter of law based on this court's decision in Harlow vs. Fitzgerald, 457 U.S. 800 (1982).

Arnsberg then petitioned for rehearing and rehearing en banc; the petition for

rehearing was denied on May 30, 1985.

CONSTITUTION AND STATUTES

Resolution of this case requires interpretation of the following:

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized.

18 U.S.C. §3144 (1984) (formerly 18 U.S.C. §3149 (1966):

> If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpena, (sic) a judicial officer may order the arrest of the person and treat the person in accordance with the provisiions of section 3142. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to

prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

28 U.S.C. §2680(h) (1974):

> The provisions of this chapter and section 1346(b) of this title shall not apply to-- . . . (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

REASONS FOR GRANTING THE PETITION

1. This petition presents the Court

with an opportunity to refine and clarify the standards applicable to summary disposition of claims against federal agents who are sued for violations of the Fourth Amendment under Bivens or under §2680(h) of the Federal Tort Claims Act.

2. This case provides an opportunity to resolve a conflict among the Circuits as to whether a Bivens action is available directly, or by virtue of 28 U.S.C. §2680(h), against the United States as well as against individual government officials.

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1. By granting summary judgment on plaintiff's claims, notwithstanding evidence that the agents knew the law and knew the facts behind the arrest warrant, the Court of Appeals has left the Bivens remedy for violation of the Fourth Amendment and §2680(h) of the Federal Tort Claims Act "drained of meaning" (Butz v. Economou, 438 U.S. 478, 501 (1978)) in the Ninth Circuit.

Violations of the Fourth Amendment's prohibition of unreasonable searches and seizures are precisely the wrongs that Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) and 28 U.S.C. §2680(h) sought to remedy. S. Rep. No. 588, 93d Cong., 2d Sess. 3 (1973); reprinted in 1974 US Code Cong. and Ad. News 2789, 2791.

This is not a case in which a plaintiff is trying to stretch federal remedies to cover some remotely questionable conduct allegedly violating a nebulous due process "right." Compare, e.g., Paul v. Davis, 424 U.S. 693 (1976). This is not a case of agents acting on a warrant, independently and without knowledge of the underlying facts. This is a case in which an innocent citizen asserted his Fourth Amendment rights and was spitefully arrested for it.

In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the qualified immunity of officials sued under the civil rights act (42 USC

§1983) and Bivens was refined. A purely objective test was announced to protect government officials from meritless suits. The test is simply "whether the law at the time was not clearly established. . . . If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." 457 U.S. at 818-819.

Since Harlow, the Court has continued to define the parameters of the qualified immunity. In Davis v. Scherer, ___ U.S. ___, 104 S. Ct. 3012, 82 L. Ed. 2d 139, rehearing den. 105 S. Ct. 26 (1984), this Court said that violation of a statue or regulation does not defeat immunity for consitutional violations unless the violation of the statute itself gives rise to liability. Davis teaches that it is the constitutional law which must be clearly established.

At the same time, Terry v. Ohio, 392

U.S. 1, 21 (1967) teaches that the determination of probable cause must be made on a case by case basis.

When Harlow and Terry are read together, there is room for the government to argue that the law is unclear in each case, rendering the Bivens remedy useless and leaving the government power to make wrongful arrests of innocent citizens. This is especially ironic because a guilty citizen has a remedy - the exclusionary rule - while the innocent citizen has none. See, Terry v. Ohio, 392 US at 14. This court could not have intended Harlow to produce such a result.

There are at least two potential avenues for protecting the Fourth Amendment rights of innocent citizens while maintaining protection of government officials from meritless claims. One is to create an exception to the Harlow objective standard in cases where, as here, agents executing a

warrant also were the principal agents in the investigation of the case prior to the issuance of the warrant, had personal contact with the arrested person prior to the issuance of the warrant and provided the affidavit or other evidence supporting the warrant. In such a case the subjective good faith element of qualified immunity should be restored to the formula as was the case prior to Harlow. Davis v. Scherer, ___ U.S. at ___, 104 S.Ct. at 3018; Butz v. Economu, 438 U.S. at 506-507; Wood v. Strickland, 420 U.S. 308, 321-322 (1975). Another avenue is to simply hold that, while the law of probable cause is imprecise, there are certain situations (such as this one) which are well within existing precedent (see pp. 13-19, infra), thus defeating qualified immunity.[1]

The proposed exception to Harlow for

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[1] A third possibility, though not squarely presented by this case, is to require a prior favorable result analogous to the like prerequisite in malicious prosecution cases.

agents who know the facts behind the warrant is supported by everyday human experience and particularly illustrated by the facts here. Agents with no prior contact with a person are unlikely to act from malice.

Such an exception encourages the government to use emotionally neutral agents to execute warrants and provides motivation to represent facts accurately in support of arrest warrants.

These agents were angry and arrested Arnsberg to spite him for being what they perceived as obstinately insistent on his rights. They were not uninvolved officers blindly executing a warrant upon someone they did not know.

If the proposed exception is adopted, it will not expose agents to a large volume of claims. Research has failed to uncover more than a few cases squarely presenting a fact pattern in which the same agents executing a warrant also obtained it.[2]

The exception proposed would insure proper treatment of citizens while placing little or no burden on public officials.

Even without the proposed exception, the agents are not entitled to immunity. The law applicable to this arrest was perfectly clear whether the warrant is construed as a material witness warrant or a criminal warrant for failure to appear before the grand jury.

If the warrant was what it most readily appears to be - a criminal arrest warrant for "failure to appear before the Federal Grand Jury" (App. K, infra) - then the applicable law required personal service of a subpoena

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[2] Cases which mention the present situation in dictum include, Smiddy V. Varney, 665 F.2d 261, 266-267 (9th Cir. 1981) (pressure or false information given by investigating officer to U. S. Attorney would defeat immunity). Rodriguez v. Ritchey, 556 F.2d 1185, 1195 (5th Cir. 1977) cert. den. 434 U.S. 1047 (1978) Hill, J. concurring (eight judges agreed that an officer who maliciously sought the indictment should not be immune); Boyd v. Hoffman, 342 F. Supp. 787, 789 (N.D. Ohio 1972) (no summary judgment if defendants had knowledge and involvement in issuance of invalid warrant).

before such a warrant would be valid. Fed. Rules Cr. Proc., 18 U.S.C. Rule 17. The agents knew that Arnsberg had not been served. They are held to know the law governing their conduct. Harlow 457 U.S. at 818-819. They actually knew the law requiring personal service (CR 17, Defendant's Answers to Plaintiff's First Interrogratory, p. 1; CR 29, p. 33).

The United States Attorney declared in open court that the warrant was for failure to appear (App. O, infra). Nevertheless, if the warrant is construed as a material witness warrant, because it refers to 18 U.S.C. §3149 at the bottom of the form (App. K, infra) or even because the agents now may claim they thought the warrant was a material witness warrant, then the law still was clearly established.

Controlling law of the jurisdiction at the time of the arrest was contained in Bacon v. United States, 449 F.2d 933 (9th Cir.

1971) and 18 U.S.C. §3149 (1966). At the time of the arrest, Bacon was nine years old. Bacon required a showing that (1) the testimony of the witness was material and (2) it may become impracticable to secure the witness by subpoena. 18 U.S.C. §3144 (1984); Bacon, 449 F.2d at 943. The first element is met by the mere statement of a public official. 449 F.2d at 943. The affidavit contains no such statement. The second element requires a factual showing that the witness is likely to flee or "go underground." 449 F.2d at 944.

It was no more difficult to serve Arnsberg with a subpoena than it was to arrest him. There was no likelihood whatsoever that Arnsberg would flee. He had neither committed nor been charged with a crime. Arnsberg owned a grocery business in Portland (CR 17, Arnsberg Aff. pp. 1 and 2). He was a life-long Portland resident (CR 55, p. 27). He had never concealed himself, and

he had never expressed any intention to refuse to testify (CR 17, Arnsberg Aff. pp. 2-3; CR 55, pp. 9, 11, 42, 43).

Most significantly, when the agents belligerently warned Arnsberg that he was "asking for trouble" (CR 17, Arnsberg Aff. p. 3), Arnsberg waited for them and volunterred the fact that he would do so, (CR 17, Arnsberg Aff. p. 3). The agents spite, however, only could be served by their arresting Arnsberg, instead of serving him with a subpoena.

Bacon held that there was no showing that it was impracticable to secure Bacon's testimony without a subpoena, although she had connections with fugitives from justice, access to large sums of money and was eventually apprehended on a rooftop. Surely, if there was no probable case to arrest Bacon, there was none to support Arnsberg's arrest. Arnsberg was at work, without connections with fugitives and without large

sums of money. If there had actually been a basis to believe Arnsberg would flee, why did the United States Attorney recommend to the Magistrate that he be released to his own recognizance? (App. O, infra).

The facts show that these agents acted in bad faith. The affidavit submitted by the agents to support the warrant (App. J, infra) was misleading. It alleges "that Arnsberg did not appear before the grand jury" as if Arnsberg had some duty to appear. It also states that Arnsberg said he "would not cooperate," when, in reality Arsnberg merely insisted on his right to have his testimony required by personal service (CR 17, Arnsberg Aff. p. 2). The affidavit further contains the statement that Arnsberg had not been to any of his stores for over a month. This is not only false (CR 17 Arnsberg Aff.; App. N, infra), it is a "fact" of which agent Maney could not have had personal knowledge.

The agents knew better. Their job

description requires knowledge of the law, as well as finding the facts: "Knowledge of basic principles and techniques of investigating, including laws and decisions relating to investigative procedures." (App. H, infra.)

It is ludicrous to suggest that these agents with their "21 years combined experience" (CR 29, pp. 19, 28, 41) did not know that this arrest was improper. Their statements to the contrary are not credible. The agents' testimony at trial will be subject to impeachment. Agent Weiler, for example, was convicted of embezzlement while this case was before the Court of Appeals (App. I, infra).

The same facts which defeat the good faith immunity of the agents also show that the agents acted tortiously. Under the general common law, an officer is privileged to make an arrest pursuant to warrant only if he relied upon a facially or fairly valid

warrant. Restatement (2d) Torts §122 (1965). While privileged tortious conduct is still tortious, it cannot be said that these agents relied on any warrant[3] because they knew the facts supporting the warrant did not constitute probable cause.

Section 127 of the Restatement (2d) Torts states, "the arrest of another is not privileged unless the actor makes the arrest for the purpose of bringing the other before a Court, body, or official or otherwise securing the administration of the law." The evidence shows that these officers acted out of spite and "to teach Arnsberg a lesson"

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[3] Both the District Court and the Court of Appeals held that the warrant was facially and substantively invalid whether construed as a warrant for failure to appear or a material witness warrant. Furthermore, the warrant was declared to be invalid and quashed by the District Court prior to Arnsberg's civil action. The United States is, therefore, precluded by collateral estoppel, from contending that the warrant was valid. See, Allen v. McCurry, 449 U.S. 90 (1980). We adhere to our position that the warrant, in addition to being invalid, was invalid on its face and that reliance on a facially invalid warrant does not defeat liability for false arrest.

rather than for the purpose of securing the administration of the law.

Even if the agents' conduct does not qualify as a "false arrest," the agents are liable for malicious prosecution.

> If the defendant complies with the formal requirement of the law, as by swearing out a valid warrant, so that the arrest of the plaintiff is legally authorized, the defendant is not responsible for the acts of the Court and its officers. The defendant is therefore liable, if at all, only for a misuse of legal process to effect a valid arrest for an improper purpose. The action must be for malicious prosecution, upon proof of malice and want of probable cause, as well as termination of the proceeding in favor of the plaintiff. Keeton et. al., Prosser and Keeton on Torts, §11, p. 54 (5th edition 1984).

The agents' actions were, therefore, tortious under the common law and the United States is vicariously liable for those actions under §2680(h) of the Federal Tort Claims Act.

The officers' conduct was also tortious

under Bivens, making the United States liable under the Federal Tort Claims Act. The Fourth and Fifth Circuit Courts of Appeals disagree on this point. Norton v. United States, 581 F.2d 390, 392-93 (4th Cir. 1978) cert. den. 439 U.S. 1003 (1978) holds that §2680(h) incorporates Fourth Amendment violations while Brown v. United States, 653 F.2d 196, 199-201 (5th Cir. 1981) cert. den., 456 U.S. 925 (1982) rejects the Fourth Circuit's position.

The fact that the agents may have been immune from libilty for violation of the Fourth Amendment does not defeat the tortious nature of the conduct, Davis v Scherer, ___ U.S. at ___, 104 S. Ct. at 3018, nor does it defeat liability of the United States for purposes of the Tort Claims Act. 28 U.S.C. §2680(h) was amended in 1974 to provide for government liabilty for false arrest and constitutional violations:

> It is not the intention of this amendment to allow any other defenses. . .that may be available

to the individual defendant. . .to be asserted by the government. Congress does not oppose, however, the assertion of defenses of good faith and reasonable belief. . .on behalf of individual defendants, so long as it is understood that the government's liability is not coterminous with that of the individual defendant. Senate Committee on Government Operations, Memo No Knock legislation, August 28, 1973 at 5, quoted in, Norton v. Turner, 427 F. Supp. 138, 150 (E.D. Va. 1977) reversed, 581 F.2d 390 (1971).

[T]he committee amendment would submit the government to liability whenever its agents act under color of law so as to injure the public through searches and seizures that are conducted without warrants or with warrants issued without probable cause. However, the Committee's amendment should not be viewed as limited to constitutional tort situations but would apply to any case in which a federal law enforcement agent committed the tort while acting within the scope of his employment under color of Federal law. Senate Rep. No. 588, 93rd Congress, First Sess., 3 - 4 (1973). See also, Norton v. United States, 581 F.2d 390 395 (1978).

Obviously, the term "false arrest" as used in §2680(h) includes a Bivens type

violation of the Fourth Amendment as well as the more traditional common law tort of false arrest.

There is at least a genuine issue of material fact as to the good faith of the agents and as to the tortious nature of their conduct. The judgement of the Court of Appeals should be reversed and the case remanded to the District Court for trial.

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2. A split of authority exists among the Circuits on the issue of the applicability of Bivens to the United States.[4]

The fundamental principle of our system of government is that sovereignty rests with the people and that government's exercise of sovereignty exists solely through the people's grant of enumerated powers expressed in the constitution. This is the premise from which any argument as to immunity must begin.

The government would have us begin with the premise that immunity cannot be waived

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[4] Cases holding a Bivens claim may be maintained against the Federal Government include Norton v. United States, 581 F.2d 390, 395 (4th Cir. 1978) cert. den. 439 US 1003 (1978); Thornwell v. United States, 471 F. Supp. 344, 353-355 (D.C. D.C. 1979); Founding Church of Scientology v. Director FBI, 459 F. Supp. 748, 753 (D.C. D.C. 1979). Cases holding a Bivens claim may not be maintained against the Federal government include American Association of Commodity Traders v. Department of the Treasury, 598 F.2d 1233 (1st Cir. 1979); Birnbaum v. United States, 588 F.2d 319, (2d Cir. 1978); Brown v. United States, 653 F.2d 196 (5th Cir. 1981); Liuzzo v. United States, 508 F. Supp. 923 (E. D. Mich. 1981).

without a congressional mandate, as many cases have held, but how can congress waive something it never had? When the government acts outside its enumerated powers, it acts outside its immunity because it acts outside its sovereignty. A primary purpose of the framers of the constitution was to protect citizens from the kinds of abusive power they had experienced under colonial rule. The government cannot rely on a constitution, designed in part to limit governmental power, as a general grant of immunity where it acts outside those limits. The most contemporaneous discussion by this court of the concepts of sovereignty and sovereign immunity is found in Chisolm v. Georgia, II Dallas 419 (1793):

> To the constitution of the United States the term sovereign, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place, it would not, perhaps, have comported with the delicacy of those, who ordained and established the constitution. They might have announced themselves 'sovereign' people of

> the United States: But serenely conscious of the fact, they avoided the ostentatious declaration." II Dallas at 454, Wilson, J.

Justice Wilson went on to brand sovereign immunity part of "a plan of systematic despotism" in England. II Dallas at 458. Chief Justice Jay penned the following insights into the framers' intentions: "[A]t the revolution, the sovereignty devolved upon the people; and they are truly the sovereigns of the country but they are sovereigns without subjects." II Dallas at 471 Jay, C.J. (emphasis in original). [O]ur Governors are the agents of the people." They do not "partake in the sovereignty otherwise or in anyother capacity, then as private citizens." II Dallas at 472, Jay, C.J. After reserving the question of whether the United States can be sued by individual citizens, Chief Justice Jay added: "I wish the state of society was so far improved, and the science of

government advanced to such a degree of perfection, as that the whole nation could in the peaceable course of law, be compelled to do justice and be sued by individual citizens." II Dallas at 478, Jay, CJ.

In recent years the doctrine of sovereign immunity has been limited and abgrogated by Courts and legislatures. See, Hicks v. State, 88 N.M. 588, 544 P.2d 1153, 1158, Appendix (1975). The immunity doctrine has its origins in the notion that the King can do no wrong, because of some divine right. See, Keeton et. al., Prosser and Keeton on Torts, Section 131, page 1033, (5th Ed. 1984). "Just how this feudal and monarchistic doctrine ever got itself translated into the law of the belligerently democratic republic in America is today a bit hard to understand." Prosser, Law of Torts, §131, p. 971 (4th Ed. 1971). An even greater irony is that in feudal times the King's immunity was mitigated by a rule that a

minister would be liable for the King's acts. Id.

The doctrine was judicially created and, therefore, does not require legislative action to define its limits. Hicks v. State, supra, 544 P.2d at 1155. Fears of a depletion of the public treasury and that government agents would be afraid to act have proven unfounded in states which have limited or abrogated the government immunity doctrine. Ryan v. State, 134 Az. 308, 656 P.2d 597, 598, 599 (1982); Board of Commissioners of the Port of New Orleans v. Spendour Shipping and Enterprises Co., 273 S.2d 19, 25-26 (La. 1973). See also, Hicks v. State, supra; Enghauser v. Erickson Engineering and City of Lebanon, 6 Ohio State 3d 31, 451 N.E.2d 228 (1983); Pruet v. City of Rosedale, 421 S.2d 1046, (Miss. 1983); Ayala v. Philidelphia Board of Education, 453 Pa. 584, 305 A.2d 877 (1973).

As was pointed out in Chisolm, the

government is like a corporation, not a monarchy. II Dallas at 468. The government can no more act outside the constitution than a corporation can act outside its statutory authority. Such acts are ultra vires whether corporate or governmental. Ultra vires acts result in liability if anyone is harmed thereby. The government has no more power to limit acts by legislation than does a corporation by by-law or resolution.

There is analogous precedent in United States Constitutional law for the absence of sovereign immunity for violations of the Fourth Amendment. Government violations of the Fifth Amendment taking clause are not subject to sovereign immunity. Jacobs v. United States, 290 U.S. 13, 16 (1933). Cf. United States v. Testan, 424 US 392, 401 (1976). The Fourth Amendment is part of the same Bill of Rights and is an express limitation upon the sovereignty of the government of the United States, as well as a

reservation of citizens' rights. Violations of the Fourth Amendment should not be treated differently from violations of the Fifth Amendment. The "entitlement to compensation" alluded to in Testan as a basis for distinguising actions based on the taking clause from other claims, is better characterized as a limitation on government power. The government may take but only fairly, with compensation. Similarly, the Fourth Amendment allows the government to arrest, but only reasonably. Violation of either limitation gives rise to damages. Bivens v. Six Unknown Names Agents, supra; Jacobs v. United States, supra.

The fears expressed by the government in these cases are unfounded. If innocent citizens are afforded constitutional protections equivalent to those available to criminal defendants, confidence in the government will be enchanced. All large organizations make mistakes. Fear, mistrust

and disrespect are bred by the perception that there is no remedy for those mistakes. The existence of a remedy will promote a sense of fairness and alleviate any sense of oppression. A citizen should not be forced to hear, from a government that exists at the will of the people, "your arrest was wrong; tough luck."

The government should be liable for its violations of the Fourth Amendment through the vehicle of §2680(h) of the Federal Tort Claims Act and directly under Bivens v. Six Unknown Named Agents, supra.

CONCLUSION

The petition for Writ of Certiorari should be granted.

Respectfully submitted.

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Appendix A

FILED

For Publication

APR -9 1985

IN THE UNITED STATES COURT OF APPEALS
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT L. ARNSBERG,	)	
	)	No. CA 83-3590
Plaintiff-Appellee and	)	CA 83-3620
Cross-Appellant,	)	DC NO. 81-936
	)	
-vs-	)	O P I N I O N
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant-Appellant and	)	
Cross-Appellee.	)	

Appeal from the United States District Court
for the District of Oregon
The Honorable James A. Redden,
District Judge, Presiding
Argued and Submitted January 5, 1984
Decided July 31, 1984
Decision Withdrawn and Rehearing Granted
December 3, 1984

Filed April 9, 1985

BEFORE: KILKENNY, WALLACE & CANBY,
Circuit Judges

CANBY, Circuit Judge:

Robert Arnsberg filed an action against the United States under the Federal Torts

Claim Act [sic] (FTCA), 28 U.S.C. §§ 1346(b), 2401(b), 2671-80 (1982), and the fourth amendment, alleging that United States agents had arrested and imprisoned him in violation of Oregon tort law and the United States constitution. He joined the arresting officers as defendants in the action under the constitutional tort theory of Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). The district court granted summary judgment in favor of Arnsberg on one of his FTCA claims, and summary judgment in favor of the arresting officers on the Bivens claim. 549 F. Supp. 55 (D. Or. 1982). Both sides appeal.

We affirm in part, reverse in part, and remand. Regarding Arnsberg's claims against the United States, we hold that the United States' waiver of sovereign immunity in false imprisonment actions extends only to the actions of its law enforcement officials;

that the United States is not liable under the FTCA when the arresting officers did not commit the state-law tort of false imprisonment; and that the United States is not liable under the fourth amendment for unreasonable seizures committed by its agents. Regarding Arnsberg's claim against the arresting officers, we hold that the defendant officers acted constitutionally when they executed a warrant which, although invalid and facially defective, was not obviously either. We also hold that the defendant officers were immune from Bivens liability when they reasonably relied on the advice of counsel that the arrest was constitutional, and on the issuance of a warrant by a magistrate, even though the arrest was later found to be unconstitutional.

BACKGROUND

I. Facts

In 1979 and early 1980, the Internal Revenue Service was conducting an investigation into gambling affairs in the Portland area. In connection with the investigation, the IRS wished to have Arnsberg, whose name had cropped up on certain records seized by the IRS, testify before a federal grand jury. Arnsberg, however, refused to testify voluntarily, telling IRS agents Weiler and Maney, who were conducting the investigation, that he would appear before the grand jury only after being personally served with a subpoena.

On December 27, 1979, a subpoena was issued which called for Arnsberg's appearance before the grand jury on February 26, 1980. Agents Weiler and Maney made several attempts to serve the subpoena on Arnsberg. Arnsberg managed two grocery stores in Portland, Stan's Supermarket and the Hoot Owl Market. On January 25, 1980, the agents visited

Stan's Supermarket, found Arnsberg not there, and left a copy of the subpoena with one of his employees. On February 11, the agents visited the Hoot Owl, again found Arnsberg not there, and again left a copy of the subpoena with an employee. The agents made several attempts to serve Arnsberg at his father's residence, where Arnsberg resided on a part-time basis. They also called several of Arnsberg's friends and relatives in attempts to locate him. All of the agents' efforts proved unavailing, however, February 26, the date of Arnsberg's scheduled appearance, passed without the personal service required by Rule 17(d), Fed. R. Crim. P.

After discussing the matter between themselves, agents Weiler and Maney decided to consult the United States Attorney's office. Agent Maney reported the difficulties he and Weiler were encountering

to assistant United States Attorney Robinson. Robinson believed that the facts justified the issuance of a warrant pursuant to 18 U.S.C. § 3149 (1982), which authorized the arrest of material witnesses whose presence cannot practicably be secured by subpoena, see Bacon v. United States, 449 F.2d 933, 936-41 (9th Cir. 1971). Accordingly, armed with an affidavit from Maney, Robinson requested that Magistrate Leavy issue a warrant calling for Arnsberg's arrest as a material witness. On February 27, the magistrate complied. Magistrate Leavy entered an order which found the elements necessary for a material witness arrest to be satisfied and directed the issuance of a warrant. The warrant itself, however, stated that the arrest was to cause Arnsberg to answer the charge of "Failure to Appear before the Federal Grand Jury." The statute stated to have been violated was "Title 18

Section 3149", the material witness arrest warrant provision.[1/]

Later the same day, February 27, agents Maney and Weiler managed to reach Arnsberg by telephone at the Hoot Owl Market. They then went to the market and arrested him.

On March 13, 1980, Arnsberg filed a motion to quash the warrant of arrest. The district court granted Arnsberg's motion on March 31, but without entering findings of fact or conclusions of law. The government made no attempt to appeal the court's ruling.

II. Procedural History

After properly exhausting his administrative remedies, see 28 U.S.C. §§ 2401(b), 2675(a) (1982), Arnsberg filed a suit against the United States under the FTCA for false imprisonment. He included a constitutional tort claim based on Bivens v. Six Unknown Named Agents, 403 U.S. 388

(1971), against the agents Weiler and Maney. Finally, he claimed damages from the United States directly under the fourth amendment, alleging that his arrest was an unreasonable seizure.

The parties filed cross-motions for summary judgment. The district court ruled for Arnsberg on the false imprisonment claim under the FTCA, but against him on his fourth amendment claim against the government and his Bivens claim against the agents. 549 F. Supp. 55 (D. Or. 1982). After a trial on the issue of harm, the court awarded Arnsberg damages of $6,650 against the United States. Both sides appeal.

ANALYSIS

I. Standard of Review

The district court decided the case on cross-motions for summary judgment. Such action is proper only if there are no genuine issues of material fact in dispute and the

movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Tovar v. Billmeyer, 721 F.2d 1260, 1263 (9th Cir. 1983), cert. denied, 105 S.Ct. 233 (1984). In reviewing a summary judgment, we view the evidence in tne manner most favorable to the losing party. Id.

II. Arnsberg's Claims against the United States

Arnsberg presented two principal theories to justify recovery from the United States. First, he argued that the government's actions constituted the state-law tort of false imprisonment, thereby entitling him to recovery under the FTCA. Second, he argued that because his arrest was an unreasonable seizure under the fourth amendment, he was entitled to both compensatory and punitive damages from the United States directly under the fourth amendment. The district court ruled in

Arnsberg's favor on his first theory, but rejected his second one.[2] Our disposition of the issues makes it necessary to address both of Arnsberg's claims.

A. The United States' Liability under the FTCA for False Imprisonment

The district court granted Arnsberg summary judgment on his false imprisonment claim through a two-step analysis. The central controversy between Arnsberg and the United States is over the reason for Arnsberg's arrest. Arnsberg contends that he was arrested for failure to appear before the grand jury, while the government argues Arnsberg was arrested for being a material witness whose presence could not practically be secured by subpoena. In the first step of its reasoning, the district court concluded that the warrant was invalid regardless of whose version of the arrest is accepted. If Arnsberg's theory were correct, then of course the warrant would be invalid. Because

Arnsberg had not been personally served, he had no obligation to appear before the grand jury and therefore could not lawfully be arrested for failing to do so. On the other hand, the warrant would be invalid even under the government's theory. In the district court's view, the difficulties encountered by agents Weiler and Maney in attempting to serve Arnsberg did not establish probable cause for believing that it would be impracticable to secure Arnsberg's presence by subpoena. See Bacon v. United States, 449 F.2d 933, 943 (9th Cir. 1971).

In the second step of its analysis, the district court identified what it regarded as the controlling state and federal legal standards. It determined that a wrongful arrest constitutes the tort of false imprisonment under Oregon law. See Brackhahn v. Nordling, 269 Or. 667, 674, 526 P.2d 221, 224 (1974); McNeff v. Heider, 216 Or. 583,

588, 337 P.2d 819, 821 (1959). Then, probably as a result of reliance on § 2674 of the FTCA, 28 U.S.C. § 2674 (1982), the court determined that as a matter of federal law the United States is liable whenever the government falsely imprisons someone. Given those legal principles, two conclusions appeared to follow: first, because Arnsberg was arrested pursuant to an invalid warrant, his arrest was wrongful and therefore a false imprisonment under state law; second, because Arnsberg had been falsely imprisoned, the FTCA rendered the United States liable.

We agree with the first step in the district court's analysis. The government does not contend, and in good faith could not contend, that the warrant would be valid if it were issued for failure to appear before a grand jury. On the other hand, even if the warrant is construed as a material witness arrest warrant, it remains invalid. As the

district court recognized, one prerequisite to the issuance of a material witness arrest warrant is probable cause for believing that it would be impracticable to secure the witness's presence by subpoena. See Bacon v. United States, 449 F.2d 933, 943 (9th Cir. 1971). In this case, that criterion was not met. The facts do not show that Arnsberg was a fugitive or that he would be likely to flee the jurisdiction; rather, they only show a man somewhat obstinately insisting upon his right to refuse to appear before a grand jury until personally served. Those facts are insufficient to provide probable cause for believing that Arnsberg's attendance could not be secured by subpoena.[3/]

The government challenges the second step of the district court's analysis on the ground that the court erroneously interpreted state law. The court ruled that Arnsberg's arrest was a false imprisonment under Oregon

law because the arrest was effected pursuant to an invalid warrant. However, in the government's view, an arrest can be a false imprisonment only if the arresting officers themselves act tortiously. See Mundt v. United States, 611 F.2d 1257 (9th Cir. 1980) (under Arizona law, no false imprisonment occurred where court order, not the misconduct of law enforcement officials, caused the plaintiff to be imprisoned beyond his sentence). The government contends, for example, that no false imprisonment action would lie in cases where the arresting officers innocently execute unlawfully issued warrants.

We believe that the government reads Oregon tort law too narrowly. In Higgins v. Redding, 34 Or. App. 1029, 580 P.2d 580 (1978), a state judge caused the plaintiff's wrongful arrest by issuing a warrant without observing the proper procedures. The court

implied that but for the state judge's immunity, both the judge and the state would have been liable in a false imprisonment action, despite the fact that the arrresting (sic) officers engaged in no wrongdoing. Id. at 1033-34 580 P.2d at 582-83. The case indicates to us that Oregon would probably agree with the district court that any arrest pursuant to an invalaid warrant constitutes a wrongful and therefore false imprisonment regardless of the arresting officers' lack of fault.

However, we need not finally resolve the state-law issue raised by the government, for we find an independent defect in the district court's analysis. The district court assumed that the general principle of federal liability for state-law torts which underlies the FTCA applies in false imprisonment actions without regard to who causes the imprisonment to be wrongful. That

assumption, however, is incorrect. Section 2680(h) of the Act, 28 U.S.C. § 2680(h) (1982), provides that the United States' liability for false imprisonment is limited to the "acts or omissions of investigative and law enforcement officers," (emphasis added). Thus as a matter of federal if not state law, the district court should have limited its inquiry to whether the law enforcement officers working on Arnsberg's case, namely agents Weiler and Maney, acted tortiously; it should not be assumed that any arrest and imprisonment which would be regarded as tortious under state law necessarily generates liability for the United States under the FTCA. Under Oregon law as the district court interpreted it, there are many ways in which an arrest and imprisonment can be tortious without a wrongful or tortious act being committed by a law enforcement official. Clearly, for

instance, such a situation arises when an arresting officer with no prior involvement in the matter innocently executes a warrant which, although invalid, reasonably appeared lawful to the officer. The FTCA, however, limits the United States' liability to instances where wrongful acts by law enforcement officers cause the unjustified imprisonment.

It is true that there is legislative history which runs counter to our interpretation of the FTCA and supports the district court's position. The Senate Report to § 2680(h) states that "the Committee amendment would submit the government to liability whenever its agents. . .injure the public through search and seizures that are conducted. . .with warrants issued without probable cause." S. Rep. No. 588, 93d Cong., 2d Sess. 3 (1973), reprinted in 1974 U. S. Code Cong. & Ad. News 2789, 2791. That

excerpt suggests that the United States is to incur liability for all arrests made pursuant to invalid warrants, regardless of who causes the arrest to be wrongful. We decline to accept that reading of the statute on the basis of such a fragmentary indication of congressional intent,[4] however, because it runs counter to the plain words of section 2680(h). By its terms, section 2680(h) limits the liability of the United States to instances where law enforcement officials act tortiously. We accept that limitation as written.[5]

Arnsberg next argues that even if the district court had correctly focused on the actions of the arresting officers it would have granted summary judgment in his favor on the false imprisonment claim. He presents two theories in support of this contention. First Arnsberg develops an argument from the Oregon law of citizen's arrests. If a

private individual had apprehended Arnsberg, either for failure to appear before a grand jury or for being a material witness whose presence could not be secured by subpoena, the individual would be liable for false imprisonment. Under Oregon law, a citizen's arrest is lawful only if a crime has actually been committed. Or. Rev. Stat. § 133.225(1) (1983); O'Brief v. Eugene Chemical Exports, Inc., 63 Or. App. 284, 286, 664 P.2d 1106, 1107 (1983). As we have already determined, however, Arnsberg did nothing criminal for which he could be lawfully apprehended. Using the general principle that the liability of the United States is measured by the liability that private individuals acting similarly would incur, see 28 U.S.C. § 2674 (1982), Arnsberg argues that the United States incurred liability for the arrest made by agents Weiler and Maney.

The Second Circuit encountered a similar

argument in Caban v. United States, 728 F.2d (2d Cir. 1984), a case involving an allegedly unlawful detention by federal immigration officers. The Second Circuit refused to assess the liability of the immigration officers by the liability which a private individual making a citizen's arrest would incur. The court recognized that because the immigration officers have different privileges and duties than do private individuals, a private citizen making a citizen's arrest does not act under the "like circumstances" required by § 2674. 728 F.2d at 73-74. We find the reasoning of Caban persuasive. Like the immigration officers in Caban, agents Weiler and Maney have law enforcement obligations, such as the duty to execute warrants, which private citizens lack; those obligations make the law of citizen arrests an inappropriate instrument for determining FTCA liability. The proper

source for determining the government's liability is not the law of citizen's arrests, but rather the law governing arrests pursuant to warrants.

Arnsberg then argues that he is entitled to prevail even under the law governing arrests pursuant to warrants. The arrest warrant issued by the magistrate contained a facial discrepancy. While the warrant verbally described the crime charged as failure to appear before the grand jury, it recited in the statutory section that Arnsberg had violated 18 U.S.C. § 3149, the material witness arrest provision. Arnsberg argues that it is tortious for any officer to execute a warrant containing that sort of facial discrepancy.

We reject Arnsberg's argument for three reasons. First, under facts established by the government and not controverted by Arnsberg for purposes of the cross-motions

for summary judgment, the agents acted nearly perfectly. They made diligent attempts to effect personal service; after they encountered difficulties, agent Maney quite properly reported them to an assistant United States Attorney; pursuant to the lawyer's directions, Maney submitted an accurate affidavit to the magistrate. Arnsberg suggests that the affidavit was misleading because, in reciting that Arnsberg did not appear before the grand jury on February 26, 1980, it implied that he had a duty to do so. We find no such misleading tendency; the affidavit made clear that the agents had not previously served the subpoena on Arnsberg. There are no allegations that the agents used excessive force or improper tactics in executing the subsequently issued warrant. Although we have found no case on point, we do not believe an Oregon court would hold agents who act so close to the letter of

their obligations to be tortfeasors.

Second, the discrepancy which Arnsberg relies on is a relatively minor and a relatively technical one. Failure to appear before a grand jury is at the least a close cousin of 18 U.S.C. § 3149, the material witness arrest warrant provision. To a person untrained in the law, "failure to appear" could seem a plausible label for the "offense" of being a material witness whose presence cannot practically be secured by subpoena. It would be an unreasonable allocation of duties, cf. Baker v. McCollan, 443 U.S. 137, 145-46 (1979), to impose upon law enforcement officers like Weiler and Maney the obligation of scrutinizing arrest warrants for such minor discrepancies.

Our final reason for rejecting Arnsberg's argument is that agents Weiler and Maney acted properly under the general common law. According to the Restatement (Second)

of Torts, an arrest is privileged if it is made pursuant to a warrant which is regular in form and which reasonably appears to have been issued by a court with jurisdiction. See Restatement (Second) of Torts, §§ 122-24 (1965); accord 32 Am. Jur. 2d False Imprisonment § 81 (1982). The arrest made by agents Weiler and Maney satisfied those criteria. The arrest warrant was "regular in form" because it was signed by the magistrate, identified Arnsberg by name, and contained entries in the sections calling for a description of the offense and a statutory situation, see Fed. R. Crim. P. 4(c)(1). The arrest warrant was issued by a court of competent jurisdiction because it came from the federal district court in Oregon. In default of more specific guidance, we regard the general common law as highly probative of the agents' likely treatment from an Oregon court.

It is apparent, then, that the district court erred in failing to limit its inquiry to whether the government's law enforcement officers, agents Weiler and Maney, acted tortiously. For the reasons just discussed we conclude that the two agents committed no tort under Oregon Law, a conclusion that we are free to reach de novo. In re McLinn, 739 F.2d 1395, 1397 (9th Cir. 1984)(en banc). From this conclusion, it follows that the summary judgment in favor of Arnsberg on his false imprisonment claim must be reversed, and that upon remand summary judgment must be entered in favor of the government on that claim.[6/]

B. The United States' Liability Directly under the Fourth Amendment

Arnsberg argues that we should imply a right of action against the United States directly under the fourth amendment. In essence, he asks us to extend the theory of Bivens v. Six Unknown Named Agents, 403 U.S.

388 (1971)), to include a remedy against the United States. The district court rejected Arnsberg's argument.

If we were to imply the cause of action Arnsberg rquests, summary judgment under it in his favor would be required. Under Arnsberg's constitutional theory, liability would be predicated not only on the actions of the government's law enforcement officers but also upon the actions of its adjudicative officials. As we have discussed, the facts show that Magistrate Leavy made an erroneous determination of probable cause and thereby caused Arnsberg to be subject to an unreasonable seizure. A further boon accruing to Arnsberg would be that he could recover punitive damages under his constitutional theory. Compare Carlson v. Green, 446, U.S. 14, 21-22 (1980) (punitive damages available in Bivens actions), with 28 U.S.C. § 2674 (1982) (punitivie damages not

available in the FTCA actions).

The doctrine of sovereign immunity, however, prevents us from extending Bivens in the manner which Arnsberg seeks. "in a suit against the United States, there cannot be a right to money damages without a waiver of sovereign immunity. . . ." United States v. Testan, 424 U.S. 392, 400 (1976). Arnsberg argues that because his Bivens right is a constitutional one, a non-constitutional doctrine of soverign immunity ought not to take precedence over it. While this argument is not without logic, it is foreclosed by our recent ruling in Holloman v. Watt, 708 F.2d 1399, 1401-02 (9th Cir. 1983), cert. denied, 104 S.Ct. 2168 (1984), that Bivens does not provide a means of cutting through the sovereign immunity of the United States itself. Accord American Association of Commodity Traders v. Department of the Treasury, 598 F.2d 1233, 1235-36 (1st Cir.

1979); Duarte v. United States, 532 F.2d 850, 851-52 (2nd Cir. 1976).[7/]

III. Arnsberg's Bivens Claim Against the Individual Agents

Arnsberg argued below that agents Weiler and Maney subjected him to an unreasonable seizure under the fourth amemdment; therefore he claimed compensatory and punitive damages under Bivens. The district granted summary judgment on Arnsberg's Bivens claim in favor of the agents, holding that the agents were entitled to qualified immunity because they acted in reasonable good faith. On appeal, Arnsberg argues that summary judgment should have been granted in his favor; in the alternative, he argues that at the least a material factual dispute exists as to his Bivens claim, thus precluding summary judgment in favor of the government.

Arnsberg presents two theories as to why the district court should have granted summary judgment in his favor. First,

Arnsberg argues that Weiler and Maney should have known that a material witness arrest warrant could not have been validly issued; therefore, they should have refused to execute the warrant. Second, he contends that Weiler and Maney should not have executed the warrant because of the facial discrepancy it contained.

We reject Arnsberg's first argument without even reaching the question whether the agents are protected by any qualified immunity, see Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Although we do hold that Arnsberg's arrest warrant is invalid even if considered as a material witness arrest warrant, that is not an obvious conclusion. Reasonable attorneys could disagree with our probable cause assessment. It would be plainly unreasonable to rule that the arresting officers, Weiler and Maney, must take issue with the considered judgment of an

assistant United States Attorney and the federal magistrate. Not only would such a rule cause an undesirable delay in the execution of warrants, but it would also mean that lay officers must at their own risk second-guess the legal assessments of trained lawyers. The Constitution does not require that allocation of law enforcement duties. Baker v. McCollan, 443 U.S. 137, 145-46 (1979).[8/]

Arnsberg's second argument, which is based on the warrant's facial discrepancy, also falls before the principle that the Constitution requires no more than a "reasonable division of functions between law enforcement officers, committing magistrates, and judicial oficers (sic)." Id. at 145. As we have already indicated, the discrepancy which appeared on the face of the warrant is not a serious one. To a person inattentive to legal details, "failure to appear before

the federal grand jury" could seem a reasonable description for the "offense" of being a material witness whose presence cannot practically be secured by subpoena. It would be unreasonable, and hence it is not constitutionally required, to demand that arresting officers regularly scrutinize warrants for such technical discrepancies. Cf. Johnson v. Miller, 680 F.2d 39, 41 (7th Cir. 1982) (arresting oficers (sic) do not have a constitutional obligation to review warrants for discrepancies between the description in the warrant and the appearance of the person to be arrested).[9/]

Arnsberg was not entitled to summary judgment on his Bivens claim: the arresting officers committed no fourth amendment violations. We reject Arnsberg's argument that a material issue of fact precluded the district court from entering summary judgment in favor of the agents. Under the

established facts, the agents are insulated from liabilty by a qualified immunity because "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).[10/]

Before seeking a warrant for Arnsberg's arrest, agents Weiler and Maney consulted with assistant United States Attorney Robinson. The agents accurately recounted the difficulties they encountered in attempting to serve Arnsberg personally. Robinson concluded that the facts justifed the issuance of a material witness warrant pursuant to 18 U.S.C. § 3149 and he requested that Magistrate Leavy issue a material witness warrant for Arnsberg's arrest. The agents reasonably relied on Robinson's belief that Arnsberg's arrest was legal. They had no reason to doubt Robinson's assessment of

probable cause.

This case is factually distinguishable from Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977), cert. denied, 438 U.S. 916 (1978), in which the District of Columbia Circuit held that the advice of counsel did not render a police officer's belief reasonable and entitle him to a qualified immunity for the illegal arrests that he made. In Dellums, unlike this case, the police officer's conduct exceeded the scope of counsel's advice. Also the police officer in Dellums was fully acquainted with the controlling case law and did not need the advice of counsel to assess probable cause. Id. at 185. In this case, however, as we explained earlier, reasonable attorneys could disagree about our probable cause assessment. We, therefore, should not expect agents Weiler and Maney to have determined independently whether probable cause existed.

Counsel's advice would prevent a reasonable person from knowing that Arnsberg's constitutional rights were being violated. We hold that agents Weiler and Maney are immune from Bivens liability as a matter of law under the accepted facts.

The judgment of the district court in favor of the United States and the individual defendants on the Bivens claim is affirmed. The judgment in favor of Arnsberg on this claim under the FTCA is reversed and the case is remanded with directions to the district to enter summary judgment for the United States on that claim.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

FOOTNOTES

1 The arrest warrant, which followed a standardized form, provided:

> You are hereby commanded to arrest Larry Arnsberg, and bring him forthwith before the nearest available United States Magistrate to answer a complaint charging him with Failure to Appear before the Federal Grand Jury, in violation of U.S.C. Title 18, Section 3149.

The underscored words show where blank spaces occurred in the standardized form and how Magistrate Leavy completed them.

2 Arnsberg also argued that the FTCA directly incorporates fourth amendment standards. Compare Norton v. United States, 581 F.2d 390, 392-93 (4th Cir.) (adopting Arnsberg's incorporation argument), cert. denied, 439 U.S. 1003 (1978), with Brown v. United States, 653 F.2d 196, 199-201 (5th Cir. 1981) (rejecting the argument), cert. denied, 456 U.S. 925 (1982). Because the district court decided in favor of Arnsberg under his false imprisonment theory, it had

not occasion to reach the merits of Arnsberg's incorporaton (sic) argument. We decline to address it here. See also note 4, infra.

3 Because we agree after a de novo review that the warrant is invalid, we do not have to decide whether collateral estoppel would require us to reach that conclusion. Arnsberg argues, with a good deal of persuasiveness, that the validity of his arrest warrant was finally determined when the district court granted his motion to quash the warrant on March 31, 1980, and the government decided not to attempt an appeal. If the validity of the warrant were finally determined on March 31, then of course collateral estoppel would bar relitigation of the issue in this action.

4 We note that another passage from the same Senate Report has been held not to

reflect the meaning of section 2680(h). The Report states that section 2680(h) "make[s] the Government independently liable in damages for the same type of conduct that is alleged to have occurred in Bivens. . . . [H]owever, the Committee's amendment should not be viewed as limited to constitutional tort situations." S. Rep. No. 588, 93d Cong., 2d Sess. 3 (1973), reprinted in 1974 U. S. Code Cong. & Ad. News 2789, 2791. That statement suggests that section 2680(h) renders the United States liable not only for state law torts of its law enforcement officers, but for their constitutional torts as well. That expansive interpretation of section 2680(h) has been explicitly rejected, however, by the Fifth Circuit, see Brown v. United States, 653 F.2d 196, 199-201 (5th Cir. 1981), cert. denied, 456 U.S. 925 (1982), and implicitly rejected by the Supreme Court, see Carlson v. Green, 446 U.S. 14, 23 (1980). But see Norton v. United

States, 581 F.2d 390, 392-93 (4th Cir.), cert. denied, 439 U.S. 1003 (1978).

5 A second argument in support of the district court's reasoning maintains that the magistrate involved in Arnsberg's case should be regarded as an "investigative or law enforcement" official for purposes of § 2680(h). If Magistrate Leavy is an "investigative or law enforcement official," then it would indeed follow that his wrongful authorization of the arrest would bring the arrest within the purview of the FTCA. A somewhat credible argument can be made that Magistrate Leavy is an "investigative or law enforcement official" under § 2680(h). The section provides that "'investigative or law enforcement officer' means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." Magistrates, as well as judges, are empowered

to make arrests. 18 U.S.C. § 3041 (1982). Therefore, it might be supposed that § 2680(h) encompasses instances of false imprisonment caused by magistrates or judges who make erroneous judgments in issuing warrants.

We can accept the argument that magistrates and judges are "investigative or law enforcement officers" for purposes of § 2680(h) when actually apprehending a suspect. We are confident, however, that Congress intended § 2680(h) to apply only when the federal official acts in his or her investigative or law enforcement capacity. Congress could not, for instance, have intended to submit the United States to liability when an official acting in a private capacity commits a tort of false imprisonment. A judge or magistrate when acting adjudicatively does not act in an investigative or law enforcement capacity. It therefore follows that when acting

It therefore follows that when acting adjudicatively, as was Magistrate Leavy in this case, a judge or magistrate is not within the purview of § 2680(h).

6 Our disposition of the false imprisonment claim makes it unnecessary for us to rule upon the government's contention that it is entitled to assert the qualified immunity of its officers in defense of that claim.

7 Actions brought under the taking clause of the fifth amendment are, of course, an exception to the rule that sovereign immunity is a bar to damages against the United States for direct constitutional violations. See Duarte, 532 F.2d at 852 n.3.

8 We reserve the question of whether law enforcement agents have a constitutional obligation to refuse to execute an arrest warrant when its invalidity is or should be

obvious to them. We do observe, however, that the Seventh Circuit has held constitutional even the action of an officer who had reason to know that he was executing a mistakenly issued warrant. See Johnson v. Miller, 680 F.2d 39, 41-42 (7th Cir. 1982).

9 We reserve the question of whether law enforcement officers have a constitutional duty to refuse to execute an arrest warrant which contains an obvious and serious discrepancy. Cf. supra. n. 8.

10 The Harlow standard may be applied even through (sic) the events in issue occurred before Harlow was decided. See Brewer v. Blackwell, 692 F.2d 387, 398-99 (5th Cir. 1982) (so applying Harlow without discussion). In any event, the agents here would so qualify for immunity under the prior standard as having reasonably believed in good faith that the arrest was

constitutional. Pierson v. Ray, 386 U.S. 547, 557 (1967); Smiddy v. Varney, 665 F.2d 261, 266 (9th Cir. 1981), cert. denied, 459 U.S. 829 (1982).

Appendix B

FILED
May 30 1985
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT L. ARNSBERG, PLAINTIFF-APPELLEE AND CROSS-APPELLANT,	No. CA 83-3590 CA 83-3620
-VS-	O R D E R
UNITED STATES OF AMERICA, DEFENDANT-APPELLANT AND CROSS-APPELLEE.	

BEFORE: KILKENNY, WALLACE AND CANBY,
Circuit Judges

The panel as constituted above has voted unanimously to deny the petition for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected.

Appendix C

FILED

For Publication

JUL 31 1984

IN THE UNITED STATES COURT OF APPEALS
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT L. ARNSBERG,	)	
	)	No. CA 83-3590
Plaintiff-Appellee and	)	CA 83-3620
Cross-Appellant,	)	DC NO. 81-936
	)	
-vs-	)	O P I N I O N
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant-Appellant and	)	
Cross-Appellee.	)	

Appeal from the United States District Court
for the District of Oregon
The Honorable James A. Redden,
District Judge, Presiding
Argued and Submitted January 5, 1984
Decided July 31, 1984

BEFORE: KILKENNY, WALLACE & CANBY,
Circuit Judges

CANBY, Circuit Judge:

Robert Arnsberg filed an action against the United States under the Federal Torts Claim Act [sic] (FTCA), 28 U.S.C. §§ 1346(b), 2401(b), 2671-80 (1982), and the fourth

amendment, alleging that United States agents had arrested and imprisoned him in violation of Oregon tort law and the United States constitution. He joined the arresting officers as defendants in the action under the constitutional tort theory of Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). The district court granted summary judgment in favor of Arnsberg on one of his FTCA claims, and summary judgment in favor of the arresting offices on the Bivens claim. 549 F. Supp. 55 (D. Or. 1982). Both sides appeal.

We affirm in part and reverse and remand in part. Regarding Arnsberg's claims against the United States, we hold that the United States' waiver of sovereign immunity in false imprisonment actions extends only to the actions of its law enforcement officials; that the United States cannot assert the qualified immunity of its agents as a defense

in FTCA cases; and that the United States has no liability under the fourth amendment for unreasonable seizures committed by its agents. We remand Arnsberg's FTCA claim for trial because there remain in dispute material facts pertaining to whether the arresting officers committed the state-law tort of false imprisonment. Regarding Arnsberg's claim against the arresting officers, we hold that law enforcement officers act constitutionally when they execute warrants which, although invalid and facially defective, are not obviously either. Because a material issue of fact exists regarding whether the defendant law enforcement officers deceived an assistant United States Attorney and a federal magistrate, we also remand the Bivens action for trial.

BACKGROUND

I. Facts

In 1979 and early 1980, the Internal Revenue Service was conducting an investigation into gambling affairs in the Portland area. In connection with the investigation, the IRS wished to have Arnsberg, whose name had cropped up on certain records seized by the IRS, testify before a federal grand jury. Arnsberg, however, refused to testify voluntarily, telling IRS agents Weiler and Maney, who were conducting the investigation, that he would appear before the grand jury only after being personally served with a subpoena pursuant to Fed. R. Crim. P. 17(d).

On December 27, 1979, a subpoena was issued which called for Arnsberg's appearance before the grand jury on February 26, 1980. Agents Weiler and Maney made several attempts to serve the subpoena on Arnsberg. Arnsberg managed two grocery stores in Portland, Stan's Supermarket and the Hoot Owl Market.

On January 25, 1980, the agents visited Stan's Supermarket, found Arnsberg missing, and left a copy of the subpoena with one of his employees. On February 11, the agents visited the Hoot Owl, again found Arnsberg missing, and again left a copy of the subpoena with an employee. The agents made several attempts to serve Arnsberg at his father's residence, where Arnsberg resided on a part-time basis. They also called several of Arnsberg's friends and relatives in attempts to locate him. All of the agents' efforts proved unavailing, however. February 26, the date of Arnsberg's scheduled appearance, passed without the personal service required by Rule 17(d).

After discussing the matter among themselves, agents Weiler and Maney decided to consult the United States Attorney's office. At this point in the story, Arnsberg's version of the facts diverges from

the government's.

According to Arnsberg, on February 27 agent Maney told assistant United States Attorney Robinson that he and Weiler had effected personal service, but that Arnsberg had nevertheless failed to appear for the scheduled grand jury hearing. Relying on Maney's deceptive statements and using a misleading affidavit from the agent, Robinson immediately asked United States Magistrate Leavy to issue a warrant calling for Arnsberg's arrest for failure to appear before the grand jury. Magistrate Leavy complied with the attorney's request and on February 27 issued the warrant. Arnsberg supports his version of the facts by pointing out that the February 27 arrest warrant describes his offense as "Failure to Appear before the Federal Grant Jury."

The government's view of the facts differs substantially from Arnsberg's.

According to the government, agent Maney honestly reported the difficulties he and Weiler were encountering to assistant United States Attorney Robinson. Robinson believed that the facts justified the issuance of a warrant pursuant to 18 U.S.C. § 3149 (1982), which authorized the arrest of material witnesses whose presence cannot practicably be secured by subpoena, see Bacon v. United States, 449 F.2d 933, 936-41 (9th Cir. 1971). Accordingly, armed with an affidavit from Maney, Robinson requested that Magistrate Leavy issue a warrant calling for Arnsberg's arrest as a material witness. On February 27, the magistrate complied. The government defends its view of the facts by observing that prior to issuing his warrant, Magistrate Leavy had entered an order which found the elements necessary for a material witness arrest satisfied; the government also observes that the arrest warrant recites in

its statutory section that Arnsberg violated "Title 18 Section 3149", the material witness arrest warrant provision.[1/]

There is no disagreement regarding what happened after the issuance of the arrest warrant on February 27. That same day, agents Maney and Weiler phoned Arnsberg at the Hoot Owl Market. When the agents arrived at the market, they arrested him.

On March 13, 1980, Arnsberg filed a motion to quash the warrant of arrest. The district court granted Arnsberg's motion on March 31, but without entering findings of fact or conclusions of law. The government made no attempt to appeal the court's ruling.

II. Procedural History

After properly exhausting his administrative remedies, see 28 U.S.C. §§ 2401(b), 2675(a) (1982), Arnsberg filed a suit against the United States under the FTCA

for false imprisonment. He included a constitutional tort claim based on Biven v. Six Unknown Named Agents, 403 U.S. 388 (1971), against the agents Weiler and Maney. Finally, he claimed damages from the United States directly under the fourth amendment, alleging that his arrest was an unreasonable seizure.

The parties filed cross-motions for summary judgment. The district court ruled for Arnsberg on the false imprisonment claim under the FTCA, but against him on his fourth amendment claim against the government and his Bivens claim against the agents. 549 F. Supp. 55 (D. Or. 1982). After a trial on the issue of harm, the court awarded Arnsberg damages of $6,650 against the United States. Both sides appeal.

ANALYSIS

I. Standard of Review

The district court decided the case on

cross-motions for summary judgment. Such action is proper only if there are no genuine issues of material fact in dispute and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Tovar v. Billmeyer, 721 F.2d 1260, 1263 (9th Cir. 1983). In reviewing a summary judgment, we view the evidence in the manner most favorable to the losing party. Id.

II. Arnsberg's Claims against the United States

Arnsberg presented two principal theories to justify recovery from the United States. First, he argued that the government's actions constituted the state-law tort of false imprisonment, thereby entitling him to recovery under the FTCA. Second, he argued that because his arrest was an unreasonable seizure under the fourth amendment, he was entitled to both compensatory and punitive damages from the

United States directly under the fourth amendment. The district court ruled in Arnsberg's favor on his first theory, but rejected his second one.[2/]

The government claimed that it was entitled to assert the qualified immunity of its agents in a FTCA action. Under the government's theory, it has no liability under the FTCA if its agents meet the qualified immunity standards of Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The district court rejected the defense.

Our disposition of the issues makes it necessary to address both of Arnsberg's claims, as well as the government's claim to a qualified immunity defense..

A. The United States' Liability under the FTCA for False Imprisonment

The district court granted Arnsberg summary judgment on his false imprisonment claim through a two-step analysis. The central controversy between Arnsberg and the

United States is over the reason for Arnsberg's arrest. Arnsberg contends that as a result of agent Maney's falsehoods, he was arrested for failure to appear before the grand jury, while the government argues Arnsberg was arrested for being a material witness whose presence could not practically be secured by subpoena. In the first step of its reasoning, the district court concluded that the warrant was invalid regardless of whose version of the arrest is accepted. If Arnsberg's theory were correct, then of course the warrant would be invalid. Because Arnsberg had not been personally served, he had no obligation to appear before the grand jury and therefore could not lawfully be arrested for failing to do so. On the other hand, the warrant would be invalid even under the government's facts. In the district court's view, the difficulties encountered by agents Weiler and Maney in attempting to

serve Arnsberg did not establish probable cause for believing that it would be impracticable to secure Arnsberg's presence by subpoena. See Bacon v. United States, 449 F.2d 933, 943 (9th Cir. 1971).

In the second step of its analysis, the district court identified what it regarded as the controlling state and federal legal standards. It determined that a wrongful arrest constitutes the tort of false imprisonment under Oregon law. See Brackhahn v. Nordling, 269 Or. 667, 674, 526 P.2d 221, 224 (1974); McNeff v. Heider, 216 Or. 583, 588, 337 P.2d 819, 821 (1959). Then, probably as a result of reliance on § 2674 of the FTCA, 28 U.S.C. § 2674 (1982), the court determined that as a matter of federal law the United States is liable whenever the government falsely imprisons someone. Given those legal principles, two conclusions appeared to follow: first, because Arnsberg

was arrested pursuant to an invalid warrant, his arrest was wrongful and therefore a false imprisonment under state law; second, because Arnsberg had been falsely imprisoned, the FTCA rendered the United States liable.

We agree with the first step in the district court's analysis. The government does not contend, and in good faith could not contend, that the warrant would be valid if it were issued for failure to appear before a grand jury. On the other hand, even if the warrant is construed as a material witness arrest warrant, it remains invalid. As the district court recognized, one prerequisite to the issuance of a material witness arrest warrant is probable cause for believing that it would be impracticable to secure the witness's presence by subpoena. See Bacon v. United States, 449 F.2d 933, 943 (9th Cir. 1971). In this case, that criterion was not met. The facts do not show that Arnsberg was

a fugitive or that he would be likely to flee the jurisdiction; rather, they only show a man somewhat obstinately insisting upon his right to refuse to appear before a grand jury until personally served. Those facts are insufficient to provide probable cause for believing that Arnsberg's attendance could not be secured by subpoena.[3/]

The government challenges the second step of the district court's analysis on the ground that the court erroneously interpreted state law. The court ruled that Arnsberg's arrest was a false imprisonment under Oregon law because the arrest was effected pursuant to an invalid warrant. However, in the government's view, an arrest can be a false imprisonment only if the arresting officers themselves act tortiously. See Mundt v. United States, 611 F.2d 1257 (9th Cir. 1980) (under Arizona law, no false imprisonment occurred where court order, not the

misconduct of law enforcement officials, caused the plaintiff to be imprisoned beyond his sentence). The government contends, for example, that no false imprisonment action would lie in cases where the arresting officers innocently execute unlawfully issued warrants.

We believe that the government reads Oregon tort law too narrowly. In Higgins v. Redding, 34 Or. App. 1029, 580 P.2d 580 (1978), a state judge caused the plaintiff's wrongful arrest by issuing a warrant without observing the proper procedures. The court implied that but for the state judge's immunity, both the judge and the state would have been liable in a false imprisonment action, despite the fact that the arrresting (sic) officers engaged in no wrongdoing. Id. at 1033-34 580 P.2d at 582-83. The case indicates to us that Oregon would probably agree with the district court that any arrest

pursuant to an invalaid warrant constitutes a wrongful and therefore false imprisonment regardless of the arresting officers' lack of fault.

However, we need not finally resolve the state-law issue raised by the government, for we find an independent defect in the district court's analysis. The district court assumed that the general principle of federal liability for state-law torts which underlies the FTCA applies in false imprisonment actions without regard to who causes the imprisonment to be wrongful. That assumption, however, is incorrect. Section 2680(h) of the Act, 28 U.S.C. § 2680(h) (1982), provides that the United States' liability for false imprisonment is limited to the "acts or omissions of investigative and law enforcement officers," (emphasis added). Thus as a matter of federal if not state law, the district court should have

limited its inquiry to whether the law enforcement officers working on Arnsberg's case, namely agents Weiler and Maney, acted tortiously; it should not be assumed that any arrest and imprisonment which would be regarded as tortious under state law necessarily generates liability for the United States under the FTCA. Under Oregon law as the district court interpreted it, there are many ways in which an arrest and imprisonment can be tortious without a wrongful or tortious act being committed by a law enforcement official. Clearly, for instance, such a situation arises when an arresting officer with no prior involvement in the matter innocently executes a warrant which, although invalid, reasonably appeared lawful to the officer. The FTCA, however, limits the United States' liability to instances where wrongful acts by law enforcement officers cause the unjustified

imprisonment.

It is true that there is legislative history which runs counter to our interpretation of the FTCA and supports the district court's position. The Senate Report to § 2680(h) states that "the Committee amendment would submit the government to liability whenever its agents. . .injure the public through search and seizures that are conducted. . .with warrants issued without probable cause." S. Rep. No. 588, 93d Cong., 2d Sess. 3 (1973), reprinted in 1974 U. S. Code Cong. & Ad. News 2789, 2791. That excerpt suggests that the United States is to incur liability for all arrests made pursuant to invalid warrants, regardless of who causes the arrest to be wrongful. We decline to accept that reading of the statute on the basis of such a fragmentary indication of congressional intent,[4/] however, because it runs counter to the plain words of section

2680(h). By its terms, section 2680(h) limits the liability of the United States to instances where law enforcement officials act tortiously. We accept that limitation as written.[5/]

Arnsberg next argues that even if the district court had correctly focused on the actions of the arresting officers it would have granted summary judgment in his favor on the false imprisonment claim. He presents two theories in support of this contention. First Arnsberg develops an argument from the Oregon law of citizen's arrests. If a private individual had apprehended Arnsberg, either for failure to appear before a grand jury or for being a material witness whose presence could not be secured by subpoena, the individual would be liable for false imprisonment. Under Oregon law, a citizen's arrest is lawful only if a crime has actually been committed. Or. Rev. Stat. § 133.225(1)

(1983); O'Brief v. Eugene Chemical Exports, Inc., 63 Or. App. 284, ___, 664 P.2d 1106, 1107 (1983). As we have already determined, however, Arnsberg did nothing criminal for which he could be lawfully apprehended. Using the general principle that the liability of the United States is measured by the liability that private individuals acting similarly would incur, see 28 U.S.C. § 2674 (1982), Arnsberg argues that the United States incurred liability for the arrest made by agents Weiler and Maney.

The Second Circuit encountered a similar argument in Caban v. United States, 728 F.2d (2d Cir. 1984), a case involving an allegedly unlawful detention by federal immigration officers. The Second Circuit refused to

ess the liability of the immigration officers by the liability which a private individual making a citizen's arrest would incur. The court recognized that because the

immigration officers have different privileges and duties than do private individuals, a private citizen making a citizen's arrest does not act under the "like circumstances" required by § 2674. 728 F.2d at 73-74. We find the reasoning of Caban persuasive. Like the immigration officers in Caban, agents Weiler and Maney have law enforcement obligations, such as the duty to execute warrants, which private citizens lack; those obligations make the law of citizen arrests an inappropriate instrument for determining FTCA liability. The proper source for determining the government's liability is not the law of citizen's arrests, but rather the law governing arrests pursuant to warrants.

Arnsberg then argues that he is entitled to prevail even under the law governing arrests pursuant to warrants. The arrest warrant issued by the magistrate contained a

facial discrepancy. While the warrant verbally described the crime charged as failure to appear before the grand jury, it recited in the statutory section that Arnsberg had violated 18 U.S.C. § 3149, the material witness arrest provision. Arnsberg argues that it is tortious for any officer to execute a warrant containing that sort of facial discrepancy.

We reject Arnsberg's argument for three reasons. First, under the government;s construction of the facts, which we must accept for purposes of reviewing the summary judgment, the agents acted nearly perfectly. They made diligent attempts to effect personal service; after they encountered difficulties, agent Maney quite properly reported them to an assistant United States Attorney; pursuant to the lawyer's directions, Maney submitted an accurate affidavit to the magistrate. There are no

allegations that the agents used excessive force or improper tactics in executing the subsequently issued warrant. Although we have found no case on point, we do not believe an Oregon court would hold agents who act so close to the letter of their obligations to be tortfeasors.

Second, the discrepancy which Arnsberg relies on is a relatively minor and a relatively technical one. Failure to appear before a grand jury is at the least a close cousin of 18 U.S.C. § 3149, the material witness arrest warrant provision. To a person untrained in the law, "failure to appear" could seem a plausible label for the "offense" of being a material witness whose presence cannot practically be secured by subpoena. It would be an unreasonable allocation of duties, cf. Baker v. McCollan, 443 U.S. 137, 145-46 (1979), to impose upon law enforcement officers like Weiler and

Maney the obliation of scrutinizing arrest warrant, or such minor discrepancies.

Our final reason for rejecting Arnsberg's argument is that agents Weiler and Maney acted properly under the general common law. According to the Restatement (Second) of Torts, an arrest is privileged if it is made pursuant to a warrant which is regular in form and which reasonably appears to have been issued by a court with jurisdiction. See Restatement (Second) of Torts, §§ 122-24 (1965); accord 32 Am. Jur. 2d False Imprisonment § 81 (1982). The arrest made by agents Weiler and Maney satisfied those criteria. The arrest warrant was "regular in form" becsuse it was signed by the magistrate, identified Arnsberg by name, and contained entries in the sections calling for a description of the offense and a statutory situation, [sic] see Fed. R. Crim. P. 4(c)(1). The arrest warrant was issued by a

court of competent jurisdiction because it came from the federal district court in Oregon. In default of more specific guidance, we regard the general common law as highly probative of the agents' likely treatment from an Oregon court.

It is apparent, then, that the district court erred in failing to limit its inquiry to whether the government's law enforcement officers, agents Weiler and Maney, acted tortiously. If it had properly limited its inquiry, it could not have granted summary judgment for Arnsberg on his false imprisonment claim; under the government's version of the facts, Weiler and Maney committed no tort. On the other hand, it is equally apparent that the government is not entitled to judgment on the false imprisonment issue as a matter of law. Arnsberg alleges that Maney, with encouragement from Weiler, deliberately

misrepresented facts to assistant United States Attorney Robinson and Magistrate Leavy, informing t em that he and Weiler had personally served Arnsberg with a subpoena when in fact they had not. Those allegations, if true, would constitute false imprisonment under Oregon law. See Brackhahn v. Nordling, 269 Or. 667, 674, 526 F.2d 221, 224 (1974) ("[t]he essence of false arrest is causing the plaintiff to be wrongly arrested"). In this situation, we remand for further proceedings. The facts of Weiler's and Maney's conduct need to be determined and Oregon and federal law applied accordingly.

B. Qualified Immunity As a Defense in FTCA Actions.

Relying on Norton v. United States, 581 F.2d 390, 395-97 (4th Cir.), cert. denied, 439 U.S. 1003 (1978), the government argues that on remand it should be entitled to assert the qualified immunity of its law

enforcement officers as a defense to Arnsberg's false imprisonment claim. Under the government's view, it should have no liability under the FTCA so long as "their conduct does not violate clearly established . . .rights of which a reasonable person would have known," Harlow v. Fitzgerald, 457 U. S. 800, 818 (1982).

The district court rejected the government's position, and we affirm that ruling. The basic purpose of the FTCA is to make the United States liable in instances where private persons acting under like circumstances would have liability. See 28 U.S.C. § 2674 (1982). However, the qualified immunity defense which the government requests is inherently a defense which belongs to public officials. It has no private law counterpart. It would thus contravene the central purpose of the FTCA to extend it to the United States. See Wright

v. United States, 719 F.2d 1032, 1034-35 (9th Cir. 1983) (United States cannot assert the immunities of state employees as defenses in FTCA actions).

Norton, on which the government relies, does not dissuade us: the case is plainly inapplicable. The Fourth Circuit in Norton reached the qualified immunity issue after first holding that the FTCA encompasses constitutional torts. Its holding that the United States may rely upon the qualified immunity of its law enforcement agents extended only to constitutional tort actions under the FTCA. Here, of course, Arnsberg's FTCA claim is based on the state-law tort of false imprisonment, not the Constitution.[6/]

C. The United States' Liability Directly under the Fourth Amendment

Arnsberg argues that we should imply a right of action against the United States directly under the fourth amendment. In

essence, he asks us to extend the theory of Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971)), to include a remedy against the United States. The district court rejected Arnsberg's argument.

If we were to imply the cause of action Arnsberg rquests, summary judgment under it in his favor would be required. Under Arnsberg's constitutional theory, liability would be predicated not only on the actions of the government's law enforcement officers but also upon the actions of its adjudicative officials. As we have discussed, the facts show that Magistrate Leavy made an erroneous determination of probable cause and thereby caused Arnsberg to be subject to an unreasonable seizure. A further boon accruing to Arnsberg would be that he could recover punitive damages under his constitutional theory. Compare Carlson v. Green, 446, U.S. 14, 21-22 (1980) (punitive

damages available in Bivens actions), with 28 U.S.C. § 2674 (1982) (punitivie damages not available in the FTCA actions).

The doctrine of sovereign immunity, however, prevents us from extending Bivens in the manner which Arnsberg seeks. "in a suit against the United States, there cannot be a right to money damages without a waiver of sovereign immunity. . . ." United States v. Testan, 424 U.S. 392, 400 (1976). As we recently held, the government's sovereign immunity has not been waived for actions under the Constitution. Holloman v. Watt, 708 F.2d 1399, 1401-02 (9th Cir. 1983), cert. denied, 104 S.Ct. 2168 (1984); accord American Association of Commodity Traders v. Department of the Treasury, 598 F.2d 1233, 1235-36 (1st Cir. 1979); Duarte v. United States, 532 F.2d 850, 851-52 (2nd Cir. 1976).[7/]

III. Arnsberg's Bivens Claim Against the

Individual Agents

Arnsberg argued below that agents Weiler and Maney subjected him to an unreasonable seizure under the fourth amemdment; therefore he claimed compensatory and punitive damages under Bivens. The district [sic] granted summary judgment on Arnsberg's Bivens claim in favor of the agents, holding that the agents were entitled to qualified immunity because they acted in reasonable good faith. On appeal, Arnsberg argues that summary judgment should have been granted in his favor; in the alternative, he argues that at the least a material factual dispute exists as to his Bivens claim, thus precluding summary judgment in favor of the government.

Arnsberg presents two theories as to why the district court should have granted summary judgment in his favor. As he must in urging summary judgment, Arnsberg accepts arguendo the government's version of the

facts, namely that agent Maney reported truthfully to attorney Robinson and Magistrate Leavy and that the government sought and obtained a material witness arrest warrant. First, Arnsberg argues that Weiler and Maney should have known that a material witness arrest warrant could not have been validly issued; therefore, they should have refused to execute the warrant. Second, he contends that Weiler and Maney should not have executed the warrant because of the facial discrepancy it contained.

We reject Arnsberg's first argument without even reaching the question whether the agents are protected by any qualified immunity, see Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Although we do hold that Arnsberg's arrest warrant is invalid even if considered as a material witness arrest warrant, that is not an obvious conclusion. Reasonable attorneys could disagree with our

probable cause assessment. It would be plainly unreasonable to rule that the arresting officers, Weiler and Maney, must take issue with the considered judgment of an assistant United States Attorney and the federal magistrate. Not only would such a rule cause an undesirable delay in the execution of warrants, but it would also mean that lay officers must second-guess the legal assessments of trained lawyers. The Constitution does not require that allocation of law enforcement duties. Baker v. McCollan, 443 U.S. 137, 145-46 (1979).[8/]

Arnsberg's second argument, which is based on the warrant's facial discrepancy, also falls before the principle that the Constitution requires no more than a "reasonable division of functions between law enforcement officers, committing magistrates, and judicial oficers (sic)." Id. at 145. As we have already indicated, the discrepancy

which appeared on the face of the warrant is not a serious one. To a person inattentive to legal details, "failure to appear before the federal grand jury" could seem a reasonable description for the "offense" of being a material witness whose presence cannot practically be secured by subpoena. It would be unreasonable, and hence it is not constitutionally required, to demand that arresting officers regularly scrutinize warrants for such technical discrepancies. Cf. Johnson v. Miller, 680 F.2d 39, 41 (7th Cir. 1982) (arresting oficers (sic) do not have a constitutional obligation to review warrants for discrepancies between the description in the warrant and the appearance of the person to be arrested).[9/]

Arnsberg was not entitled to summary judgment on his Bivens claim: under the government's version of the facts, the arresting officers committed no fourth

amendment violations. On the other hand, we cannot uphold the summary judgment in favor of the agents. Under Arnsberg's version of the facts, agent Maney, with agent Weiler's encouragement, deliberately misrepresented facts to attorney Robinson and Magistrate Leavy. If true, those allegations would constitute a constitutional violation. See Smiddy v. Varney, 665 F.2d 261, 266-67 (9th Cir. 1981), cert. denied, 459 U.S. 829 (1982). They would also clearly defeat the agents' qualified immunity defense. Therefore, we reverse the summary judgment in favor of the agents and remand the Bivens claim for further fact finding.

The judgment of the district court is affirmed in part and reversed in part; the case is remanded to the district court.

FOOTNOTES

1 The arrest warrant, which followed a standardized form, provided:

> You are hereby commanded to arrest Larry Arnsberg, and bring him forthwith before the nearest available United States Magistrate to answer a complaint charging him with Failure to Appear before the Federal Grand Jury, in violation of U.S.C. Title 18, Section 3149.

The underscored words show where blank spaces occurred in the standardized form and how Magistrate Leavy completed them.

2 Arnsberg also argued that the FTCA directly incorporates fourth amendment standards. Compare Norton v. United States, 581 F.2d 390, 392-93 (4th Cir.) (adopting Arnsberg's incorporation argument), cert. denied, 439 U.S. 1003 (1978), with Brown v. United States, 653 F.2d 196, 199-201 (5th Cir. 1981) (rejecting the argument), cert. denied, 456 U.S. 925 (1982). Because the district court decided in favor of Arnsberg under his false imprisonment theory, it had

not occasion to reach the merits of Arnsberg's incorporaton (sic) argument. We decline to address it in the first instance here. See also note 4, infra.

3 Because we agree after a de novo review that the warrant is invalid, we do not have to decide whether collateral estoppel would require us to reach that conclusion. Arnsberg argues, with a good deal of persuasiveness, that the validity of his arrest warrant was finally determined when the district court granted his motion to quash the warrant on March 31, 1980, and the government decided not to attempt an appeal. If the validity of the warrant were finally determined on March 31, then of course collateral estoppel would bar relitigation of the issue in this action.

4 We note that another passage from the same Senate Report has been held not to

reflect the meaning of section 2680(h). The Report states that section 2680(h) "make[s] the Government independently liable in damages for the same type of conduct that is alleged to have occurred in Bivens. . . . [H]owever, the Committee's amendment should not be viewed as limited to constitutional tort situations." S. Rep. No. 588, 93d Cong., 2d Sess. 3 (1973), reprinted in 1974 U. S. Code Cong. & Ad. News 2789, 2791. That statement suggests that section 2680(h) renders the United States liable not only for state law torts of its law enforcement officers, but for their constitutional torts as well. That expansive interpretation of section 2680(h) has been explicitly rejected, however, by the Fifth Circuit, see Brown v. United States, 653 F.2d 196, 199-201 (5th Cir. 1981), cert. denied, 456 U.S. 925 (1982), and implicitly rejected by the Supreme Court, see Carlson v. Green, 446 U.S. 14, 23 (1980). But see Norton v. United

States, 581 F.2d 390, 392-93 (4th Cir.), cert. denied, 439 U.S. 1003 (1978).

5 A second argument in support of the district court's reasoning maintains that the magistrate involved in Arnsberg's case should be regarded as an "investigative or law enforcement" official for purposes of § 2680(h). If Magistrate Leavy is an "investigative or law enforcement official," then it would indeed follow that his wrongful authorization of the arrest would bring the arrest within the purview of the FTCA. A somewhat credible argument can be made that Magistrate Leavy is an "investigative or law enforcement official" under § 2680(h). The section provides that "'investigative or law enforcement officer' means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." Magistrates, as well as judges, are empowered

to make arrests. 18 U.S.C. § 3041 (1982). Therefore, it might be supposed that § 2680(h) encompasses instances of false imprisonment caused by magistrates or judges who make erroneous judgments in issuing warrants.

We can accept the argument that magistrates and judges are "investigative or law enforcement officers" for purposes of § 2680(h) when actually apprehending a suspect. We are confident, however, that Congress intended § 2680(h) to apply only when the federal official acts in his or her investigative or law enforcement capacity. Congress could not, for instance, have intended to submit the United States to liability when an official acting in a private capacity commits a tort of false imprisonment. A judge or magistrate when acting adjudicatively does not act in an investigative or law enforcement capacity. It therefore follows that when acting

It therefore follows that when acting adjudicatively, as was Magistrate Leavy in this case, a judge or magistrate is not within the purview of § 2680(h).

6 We do not reach the question whether Norton correctly decided that the FTCA encompasses constitutional torts. See supra notes 2 and 4.

7 Actions brought under the taking clause of the fifth amendment are, of course, an exception to the rule. See Duarte, 532 F.2d at 852 n.3.

8 We reserve the question of whether law enforcement agents have a constitutional obligation to refuse to execute an arrest warrant when its invalidity is or should be obvious to them. We do observe, however, that the Seventh Circuit has held constitutional even the action of an officer who had reason to know that he was executing

a mistakenly issued warrant. See Johnson v. Miller, 680 F.2d 39, 41-42 (7th Cir. 1982).

9 We reserve the question of whether law enforcement officers have a constitutional duty to refuse to execute an arrest warrant which contains an obvious and serious discrepancy. Cf. supra. n. 8.

Appendix D

FILED
JUN 10 8

JUDGMENT

United States Court of Appeals
FOR THE NINTH CIRCUIT

ROBERT L. ARNSBERG,	
Plaintiff-Appellee and Cross-Appellant,	CA 83-3590 No. CA 83-3620 D.C. # CV81-936 RE
vs.	
UNITED STATES OF AMERICA,	
Defendant-Appellant and Cross-Appellee.	

APPEAL from the United States District Court for the _____ District of Oregon (Portland)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the _____ District of Oregon (Portland) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here

ordered and adjudged by this Court, that the _____judgment of the said District Court in this Cause be, and hereby is affirmed in part, reversed in part and remanded.

A TRUE COPY JUN 07 1985
ATTEST
PHILLIP B. WINBERRY
Clerk of Court
by: Elizabeth M. Katz
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
DEC 03 1984
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

ROBERT L. ARNSBERG, PLAINTIFF/APPELLEE AND CROSS-APPELLANT,	No. CA 83-3590 CA 83-3620
-VS-	O R D E R
UNITED STATES OF AMERICA, DEFENDANT-APPELLANT AND CROSS-APPELLEE.	

BEFORE: KILKENNY, WALLACE & CANBY,
Circuit Judges

The petition of the United States for rehearing is granted. The opinion previously issued in this case is withdrawn. The matter is now submitted for decision upon rehearing.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ROBERT L. ARNSBERG, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Civil No. 81-936-RE OPINION

Stephen R. Frank
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Portland, Oregon 97204-1088

Attorneys for Plaintiff.

Charles H. Turner
United States Attorney
312 United States Courthouse
620 S. W. Main Street
Portland, Oregon 97205

Attorney for Defendant.

REDDEN, Judge:

This is an action against the United States government for false arrest and false imprisonment. I have already ruled in favor

of the plaintiff on the issue of liability, and therefore this opinion will but briefly recount the relevant facts.

Special Agents Maney and Weiler of the Internal Revenue Service (IRS) were conducting an investigation of Portland bookies. They found the name of the plaintiff in a list of customers of a bookie. They wanted Arnsberg to testify before a Grand Jury investigating the affair. Arnsberg declined to do so unless subpoenaed.

The agents prepared a subpoena. They "served" this by leaving it on the checkout stand at a grocery store Arnsberg owned. Arnsberg was not in the store at the time. The agents believed at that time (and, incidentally, no one had enlightened them at the time of trial) that they had effected a valid service upon Arnsberg by leaving the subpoena at the store. The agents had been "serving" subpoenas in this manner for some

years and had no idea that they had not effected a valid personal service. Arnsberg sought the advice of counsel as to the effect of the subpeona. Counsel informed Arnsberg that the agents must effect a personal service upon him in order for the subpoena to be valid. He consequently did not appear at the grand jury session.

Agents Maney and Weiler, concerned that their authority was being flouted, consulted an Assistant United States Attorney (AUSA). The AUSA apparently did not realize that the agents' had failed to effect personal service. He, therefore, prepared a warrant for Arnsberg's arrest, citing him for "failure to appear" before the grand jury. Arnsberg, however, was under no duty to appear since he had not been served. A magistrate signed the warrant based upon its recitation that Arnsberg had "failed to appear" before the Grand Jury. The warrant

was a nullity having been obtained through a misleading or materially false recitation of facts.

The agents and Arnsberg spoke on the telephone after the warrant had been obtained.[1/] Arnsberg agreed to wait for the agents at his store, assuming that they would serve him with a subpoena. Instead, the agents arrested him for "failure to appear." The agents handcuffed Arnsberg and took him out of the store, in view of customers employees and his cousin. Arnsberg was in custody but briefly, because the magistrate released him that afternoon, and a District Judge later granted Arnsberg's motion to quash the arrest warrant. Arnsberg brought this suit.

DAMAGES

1/ There was a dispute in the testimony as to who initiated the conversation and when it occurred. I find that it is not necessary to resolve this dispute.

Arnsberg did not allege loss of income from the arrest, or that he suffered any physical injuries. His damages are for mental anguish and embarrassment and the cost of quashingthe arrest warrant.

I grant $1,650 for the quashing of the arrest warrant. I grant $5,000 for the general damages, resulting from the arrest and confinement. His employees, customers and a member of his family either witnessed or soon learned of the arrest. The actual damage was limited by the brief confinement, and Arnsberg's reputation was not further harmed by serving a sentence.

Punitive damages are not available against the government, see 28 U.S.C. § 2674. If there were, they could be substantial in a case such as this.

Judgment shall enter against the government in the amount of $6,650.00.

Dated this 30 day of November, 1982.

James A. Redden
United States District Judge

FILED

AUG 11 1 51 PM '82
CLERK, U.S. DISTRICT COURT
DISTRICT OF OREGON

BY _____

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ROBERT L. ARNSBERG, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Civil No. 81-936-RE OPINION

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Attorney for Defendant.

REDDEN, Judge:

Robert L. Arnsberg brought this action against the federal government and certain named officers of the Internal Revenue Service (IRS) for false arrest and other related torts. The case is now before the court on cross motions for summary judgment. A review of the facts will be helpful.

FACTS

In late 1979 and early 1980, the IRS was conducting an investigation of certain wagering activities in the Portland area. Special Agent Maney and Special Agent Weiler were the principal agents in charge. Records seized from one of the targets of the investigation included a number of names, including that of the plaintiff Arnsberg. Agent Weiler called Arnsberg seeking an interview, but Arnsberg declined the invitation. Weiler informed Arnsberg that if

he did not talk voluntarily, a grand jury subpoena would issue, requiring his appearance and testimony. Arsnberg declined to cooperate until such a subpoena was served upon him.

On January 25, 1980 and again February 11, 1980 agents Maney and Weiler sought to serve Arnsberg at one of the two businesses managed by Arnsberg in the Portland area. He was not present and the agents left copies of the subpoena and a telephone number for Arnsberg to call. Arnsberg did not respond. The agents attempted to serve Arnsberg at his father's residence and also called his family and friends. Arnsberg was not found, and efforts to serve him were unsuccessful. On February 26, 1980, the investigating grand jury met but Arnsberg had not been served.

On February 27, 1980 agents Maney and Weiler met with an Assistant United States Attorney, (AUSA) to discuss the situation and

the difficulities encountered in serving Arnsberg. They decided to arrest Arnsberg. The two agents prepared affidavits recounting the above facts and the fact that Arnsberg had not appeared before the grand jury. Although Arnsberg was under no duty to appear, since he had not been served, the AUSA prepared an application for an arrest warrant for him for "failure to appear before the Grand Jury." The application, together with the agents' affidavits, were presented to a Magistrate who signed the warrant.

The AUSA advised the agents that an arrest of Arnsberg would be legal. Maney called Arnsberg and told him that he was "causing trouble," and that he wanted to meet with him. Arnsberg agreed to wait for Maney, and did so. There was apparently no mention of the arrest warrant and when the agents arrived, they arrested Arnsberg. He was handcuffed and taken from his place of

business in the view of employees and customers. He was released on his own recognizance, upon his agreement to appear before the grand jury and testify. Soon thereafter, Arnsberg moved to quash the warrant for his arrest. The motion to quash was granted by minute order.

Arnsberg then brought this suit against the United States and the two IRS agents for false arrest and invasion of privacy.

LAW

Private citizens whose constitutional rights are infringed by governmental wrong doing have two causes of action available to them. They may sue individual government officers under the Bivens doctrine, see Bivens v. Six Unknown-Named Agents, 403 U.S. 388 (1971) or they may sue the United States in tort, as provided in the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b) and § 2671 et seq. These are "parallel,

complementary [sic] causes of action." Carlson v. Green, 100 S. Ct. 1468, 1472 (1980). A plaintiff may proceed under both theories. Id.

The differences between the two causes of action will affect a plaintiff's choice of theories. A Bivens claim against individual government officers entitles the plaintiff to jury trial and punitive damages are available. Id. at 1473-4. However individual federal officers may not have the personal assets to satisfy a judgment. Moreover, defendants in a Bivens action have a qualified immunity defense available, based upon their good faith belief in the legality of their actions. Dellums v. Powell, 566 F.2d 167 (1977); Butz v. Economou, 438 U.S. 478, 500 (1978).

Under the FTCA, a plaintiff has no right to a jury trial and there can be no claim to punitive damages. I conclude, however, that

the good faith defense available to individual government officers is not available to the government itself. Townsend v. Carmel, 494 F. Supp. 30, 36-7 (D.C. D.C. 1980). This result is dictated by the legislative history of 28 U.S.C. 2680(h), a 1974 amendment ot the Federal Tort Claims Act, see Boger, Gitenstein and Verkuil, The Federal Torts Claims Act Intentional Torts Amendment: An Interpretive Analysis, 54 N.C.L. Rev. 497, 505-17 (1976).

The Fourth Circuit Court of Appeals has reached a contrary result in Norton v. United States, 581 F.2d 390 (4th Cir. 1978). There the majority reversed the district court and found that the good faith defenses were available to the government. 481 F.2d 397. The Norton court found the legislative history inconclusive, and not entitled to controlling weight. 581 F.2d 396. The Norton decision has been sharply criticized.

See 47 Geo. Wash. L. Rev. 651 (1979). The Fifth Circuit has questioned the continued vitality of certain aspects of Norton in light of the Supreme Court's intervening decision in Carlson v. Green, supra. Brown v. United States, 653 F.2d 196, 201 n. 4 (5th Cir. 1981). The D.C. Circuit has also referred to criticism of Norton in Sami v. United States, 617 F.2d 755, 767 n. 21 (D.C. Cir. 1979). Townsend v. Carmel, supra, reaches a result contrary to that in Norton, without any citation to Norton. It appears that only the Fourth Circuit now follows Norton. See, e.g., Picariello v. Fenton, 491 F. Supp. 1026, 1040-1042 (M.D. Penn. 1980) (Norton found unpersuasive).

There is no Ninth Circuit case but I believe that this Circuit will adopt the approach represented by the Townsend decision. Congress clearly intended to protect individuals by providing a defense

when they acted in good faith, but did not intend to deny all compensation to aggrieved parties in such circumstances. Congress envisioned the possibility of governmental compensation regardless of the personal liability, or immunity, of the individual government agent. See Owen v. City of Independence, Missouri, 100 S. Ct. 1398, 1415-18 (1980) (Examination of legislative intent and "considerations of public policy" compel ruling that municipalities may not assert the good faith defenses of their officers in suits under § 1983); Butz v. Economou, supra, at 503-504 (In absence of congressional direction to the contrary, federal immunity should be coterminous with corresponding immunities under § 1983). The special circumstances which warrant creation of the qualified personal immunity for agents acting in good faith do not apply to the government under the Federal Torts Claims

Act. This appears to be the course the Ninth Circuit would follow, see Wallace v. Chappel, 661 F.2d 729, 731 (9th Cir. 1981) (Official immunity question "arises only when an individual official is sued for damages").

Another notable feature of the FTCA is that it provides for federal jurisdiction and waiver of sovereign immunity, but the underlying cause of action is provided by state law. Carlson v. Green, supra, at 1474.

DISCUSSION

The present case was originally filed, under the FTCA, against the federal government and agents Maney and Weiler. Since individuals may not be sued under the FTCA, plaintiff's counsel agreed the two individual agents should be dropped. The plaintiff now seeks to re-join agents Maney and Weiler as defendants on a Bivens theory. This does not unfairly prejudice the government, and the motion is granted.

This case, then, involves a Bivens claim against agents Maney and Weiler and a claim under the FTCA against the government.

A. FTCA CLAIM

The plaintiff is entitled to partial summary judgment on the issue of liability on the FTCA claim. Although summary judgment is only appropriate where there are no genuine issues of material fact in dispute, Gaines v. Haughton, 645 F.2d 761, 769-700 (9th Cir. 1981), the parties to this case have agreed that there are no such issues here. The issue then is whether the plaintiff or defendant is "clearly entitled to prevail as a matter of law," Id. at 769. I hold that the plaintiff should prevail on the liability issue.

The underlying cause of action in a claim under the FTCA must be provided by state law, Carlson v. Green, supra, at 1474; 28 U.S.C. § 1346(b). Oregon recognizes the

torts of false arrest, false imprisonment and intrusion on the right of privacy. McNeff v. Heider, 216 Or. 583, 337 P.2d 819 and 340 P.2d 180 (1958); Napier v. Sheridan, 24 Or. App. 761, 547 P.2d 1399 (Or. App. 1976); McLain v. Boise Cascade, 271 Or. 549, 533 P.2d 343 (1975). Since the damages would be the same for any of these torts, and since I find that the federal government is liable for false arrest and false imprisonment, I need not decide whether these facts constitute the tort of invasion of privacy, see Prosser, Privacy, 48 Cal. L. Rev. 383 (1960).

Under Oregon law, an actor may be liable for false arrest and false imprisonment, regardless of whether actual malice existed and regardless of whether there was "probable cause." McNeff v. Heider, supra, at 588; Napier v. Sheridan, supra, at 765. Actual malice in such tort actions is only an issue

where punitive damages are sought, McNeff at 589. Since punitives are not available under the FTCA, 28 U.S.C. § 2674, malice is not an issue here. The plaintiff must, however, prove that the arrest or imprisonment was "false," i.e., unlawful because made without lawful authority.

It is axiomatic that the plaintiff could not lawfully be arrested for "failure to appear before the grand jury" when he was under no duty to appear. He had not been subpoenaed. The circumstances of this case indicate that Arnsberg was arrested for not being available on the two occasions when the agents sought to serve him. Under such circumstances the arrest was false and unlawful.

Although the warrant for Arnsberg's arrest charges "failure to appear before the grand jury," it also refers to 18 U.S.C. § 3149, which is the "material witness" release

provision. This provision has been interpreted by the Ninth Circuit in Bacon v. United States, 449 F.2d 933 (1971). Under Bacon, an arrest warrant may issue for a material witness when there is probable cause to believe that the testimony of the witness is material and "that it may become impracticable to secure his presence by subpoena." Bacon at 943. This latter requirement is designed to allow the government to seek to secure the testimony of a witness who is likely to flee or "go underground." Id. at 944. There must be a sufficient showing of this likelihood, based upon facts and not the conclusory allegations of investigating officers. Id.

No such showing was made here. Arnsberg owned and managed two grocery stores and there was no evidence that he would flee these community ties. He had never expressed such an intent, and when the agents called

him and asked to speak to him, he waited for them. The agents then proceeded to arrest and handcuff the plaintiff, rather than serve him with a subpoena. As the Ninth Circuit noted when it quashed the material witness warrant in Bacon,

> Such a situation differs greatly from that in which Bacon would have found herself had she been served with a subpoena. She would then have had an opportunity to reflect on her obligation to obey the process, free from the fear of imminent arrest by pursuing officers. This opportunity is granted to most witnesses, and the showing in the present case does not justify denying Bacon the same opportunity.

449 F.2d 945.

In the present case the warrant charged Arnsberg with "failure to appear before the grand jury' and it is doubtful whether it could be upheld on any other basis. Although "18 U.S.C. 3149" is typed in near the bottom of the arrest warrant, there is no likelihood that Arnsberg would have fled. Rather, the

warrant charges "failure to appear," as if Arnsberg had already been subpoenaed and had failed to appear. The facts of this case show that Arnsberg was arrested because he was not present to be subpoenaed when the agents came to his premises on two occasions, and because he did not agree to testify without a subpoena. This is not a crime, and an arrest for such is not lawful. Napier v. Sheridan, supra, at 765.[1] The plaintiff is entitled to partial summary judgment on the issue of liability on his FTCA claim.

B. Bivens Claim

---

[1] Although the plaintiff seeks to establish the unlawfulness of the arrest by the use of offensive collateral estoppel, based upon the order quashing the arrest warrant, the government objects that the basis of that ruling is not clear. Since Bacon was the only authority cited to the judge, I think the government's argument is not well-taken. In any event, I hold that the arrest was unlawful and false, without reference to any collateral effect of the judge's order.

Arnsberg also pursues a Bivens claim against Maney and Weiler, the individual IRS agents. They have filed affidavits demonstrating their "good faith" defense. The affidavits swear that the agents relied upon the legal advice of the AUSA in seeking an arrest warrant for Arnsberg and in arresting him.[2] I find that this does establish that the agents' actions were the result of a "good faith" belief that their actions were legal. There is evidence in the record from which a jury could conclude that the agents were irritated with Arnsberg for "causing trouble" by not agreeing to testify without service of a subpoena, but the agents did seek the advice of an ASUA. They followed that advice.

---

[2] The Assistant U. S. Attorney has an absolute immunity in civil suits arising out of his official duties as a prosecutor. Imbler v. Pachtman, 424 U.S. 409 (1976); Brawer v. Horowitz, 535 F.2d 830 (3rd Cir. 1976).

Smiddy v. Varney, 665 F.2d 261 (9th Cir. 1981) holds that police officers have a qualified immunity if they reasonably believe that their actions are consitutional and that their arrests are supported by probable cause. 665 F.2d 266. Law enforcement officers should be able to rely on their good faith belief that their actions are legal. Smiddy, however, contains a qualification that if the police officers act "maliciously or with reckless disregard for the rights of an arrested person," there is no immunity. Id. at 267. I hold that the agents did not recklessly disregard Arnsberg's right or act maliciously. The agents properly brought the situation to the attention of an AUSA and then followed his advice. It was not "reckless" to do so and any ill will the agents may have borne did not impact their

actions, since they were under the direction of the AUSA. As the Ninth Circuit indicated in Smiddy:

> A police officer's lot already is unfortunate because it is he who often is the only actor in the chain of decision leading to prosecution who is subject to 1983 liability. We need not make it more unfortunate by holding the officer liable for damage that is the result of the intervening fault of others in the chain. The existence of the possibility of absolute liability on the part of the municipality or governmental unit further underscores the justice of limiting the liability of the police officers. See Comment, Strict Liability Under Section 1983 for Municipal Deprivations of Federal Rights?: Owen v. City of Independence, 55 St. John's L. Rev. 153 (1980).

665 F.2d at 267.

I therefore hold that defendants Maney and Weiler are entitled to summary judgment on plaintiff's Bivens claim against them.

SUMMARY

The plaintiff is entitled to partial summary judgment on liabilty on the FTCA claim against the United States. A hearing will be scheduled for the court to assess damages.

Defendant Maney and Weiler are entitled to summary judgment on the plaintiff's Bivens claim.

Dated this 11th day of August, 1982.

James A. Redden
United States District Judge

Appendix G

FILED

Nov 30 2 24 PM '82
CLERK, U.S. DISTRICT COURT

By _____

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ROBERT L. ARNSBERG, Plaintiff,	)	Civil 81-936-RE
v.	)	JUDGMENT
UNITED STATES OF AMERICA, Defendant.	)	

IT IS ORDERED that plaintiff Robert L. Arnsberg recover of defendant United States of America, the sum of $6,650.00.

Dated this day of November, 1982.

_____
Clerk, United States District Court

DESCRIPTION AND CLASSIFICATION OF POSITIONS

31(47).1(16) IRS SPD No. 336,
Criminal Investigator, GS-1811-13

Classification Title: Criminal Investigator, GS-1811-13
Organizational Title: Special Agent
Location: IRS District Intelligence Division
Duties and Responsibilities Approved:
20 JUN 1973
(Date)
Classification Approved: 25 JUN 1973
(Date)

Director, Intelligence Division

Chief, Position Management Branch

Duties

Plans and conducts tax evasion investigations with most or all of the following characteristics:

- Evidence is hidden in complex organizational structure with large number of subsidiary activities and may involve inquiries into transactions and activities occurring in several states or throughout the country. Indirect accounting methods must often be used to establish evidence.

- Subjects are principals (one or more individuals and/or entities) with very

complex interrelationships and diversified interests that are difficult to establish. Subjects are usually characterized by most or all of the following: nationwide activities, high quality representation, precedent setting legal or investigative questions, highly complex or unusual accounting problems. Often the violators are organized crime groups with illegal activities interwoven into legitimate business enterprises.

- Investigation unfolds to involve widespread complex (e.g., organized crime interwoven into legitimate business) violations by occupational or industry groups.

- Interrelationship of facts and evidence is very difficult. Taxpayers incorporate numerous entities, holding companies, etc. (often involved in mixtures of legal and/or illegal activities) under assumed names, and weave a complicated web of financial transactions to avert detection of the evasion scheme and to make determination of the correct tax liability most difficult. Incumbent must be skilled at analyzing information obtained from diversified sources gathered over a wide section of the country and must be able to utilize the information in making a proper determination for the principal subjects as well as for subsidiaries and holding companies.

- High senstivity: Due to prominence of subject(s), legal actions could result in widespread coverage in major news media. Legal actions could have a deterrent effect or impact on large segment (often nationwide) of population, industry or profession. Subjects may be prominent

political figures or may have enterprises that reach into state and Federal affairs and link prominent political figures to case.

- Extensive planning and coordination with other Federal agencies and state and local agencies. Includes coordination as to scheduling contact of key witnesses, participating in joint conferences and planning sessions, coordinating surveillance activities, and recommending legal action timetables.

Obtains, evaluates, integrates and recommends action on, as appropriate, pieces of intelligence to identify large areas of noncompliance (e.g., major profession, occupation, industry, or wide geographic area). The incumbent is an expert in gathering intelligence, has repeatedly demonstrated fraud awareness and has well established contacts. His work is not reviewed on a day-to-day basis, his only guidance is overall Intelligence program goals. He develops projects to the point where his findings constitute a recommendation to district management with whom he may work to determine whether and how the district should devote investigative manpower as a result of his findings. He may function as a team leader and/or expert consultant in the intelligence gathering function.

Performs other duties such as: testifying as a Government witness; assisting the U. S. Attorney during the preparation of a case for trial; conducting collateral inquiries; providing protection to persons and property; training new Special Agents.

I. Knowledge Required by the Job

- Knowledge of accounting principles and techniques and ability to apply them in analyzing (to find evidence of highly complex manipulation and/or concealment) books and records of highly sophisticated accounting systems and often involving interaction of a parent organization and several subsidiaries, possibly spread throughout the country; ability to reconstruct indirectly income of a conglomerate of separate entities; skill in using third party contacts and/or available books and records to establish facts in face of taxpayer's inconsistencies or denials, which are usually part of a scheme well planned by the taxpayer and his representative.

- Knowledge of basic principles and techniques of investigating, including laws and decisions relating to investigative procedures; functions and jurisdictions of IRS Intelligence and of other Federal, state and local agencies, and relationships between agencies; skill in establishing effective, positive relationships between agencies; skill in obtaining evidence in the fact of obstacles such as subject's coercive influence over key witnesses, legal actions calculated to delay or halt investigation, and attempts to discredit the incumbent's integrity; ability to devise innovative investigative approaches, techniques and policies; ability to recognize the precedent setting (either legal or investigative) potential of an investigation and to carry out a precedent setting investigation.

- Ability to conduct interviews and interrograions; recognize, explore and exploit leads; detect ingenuously disguised discrepancies in information; distinguish between relevant and irrelevant information; prepare reports; testify in legal, quasi-legal or administrative proceedings. Skill at analyzing pieces of facts and evidence obtained from diverse sources over a wide section of the country and about which the interrelationship is unclear.

- Ability to plan and coordinate an investigation involving the participation of other Special Agents and Internal Revenue Agents whose specific tasks must be properly distributed and timed to ensure the most efficient and effective utilization of their effort.

II. Responsibility

A. Commitments and Supervisory Control. Work is ordinarily under the very general directon of a designated Intelligence supervisor who provides specific information he may have concerning the assignment and is available for consultation and advice on matters of extreme sensitivity or exceptional investigative difficulty.

Review of GS-13 work is typically in the form of discussions at certain critical points.

B. Impact of Work. Improper handling of investigation could severely hamper the speed of the investigation and might physically endanger subjects or third parties. Improper handling of investigation or legal action on subject ,

as a result of a successful investigation could result in widespread (often nationwide) publicity. The investigation may establish an important precedent in the use of investigative techniques or methods or an important legal precedent.

III. Difficulty

A. Nature, Complexity and Scope. This work involves conducting complete investigations (including drawing conclusions and recommending disposition) at the senior working level (i.e., third level beyond developmental working level. Resolution of conflicts in facts or evidence must usually be achieved in the face of subject's disruptive, diversionary and deceptive tactics; subject's explanations and defenses are very well conceived and appear plausible. Establishing facts is complicated by sheer magnitude, intricacy and obscurity of evidence. Assignments range from resolution of a number of critical issues involving very difficult legal, accounting and evidentiary problesm, to complete analysis of financial activities of individuals and entities over a period of years.

B. Guidelines/Judgment. Available guidelines include National Office issuances, Internal Revenue Manual, Internal Revenue code, U. S. Code and regulations, procedural manuals, circulars, memoranda on fraud investigations and decisions of the various U. S. Courts. Incumbent is often in situations for which there are not guidelines and he must exercise judgment quickly and without consultation with supervisor. Incumbent must make

independent decisions throughout most of an assignment; even during discussions with supervisor at certain critical points, incumbent's judgment is considered that of an expert.

IV. Personal Relationships.

A. Personal Contacts. Contacts are with subjects and their representatives and with third parties. Subjects are prominent figures (e.g., politicians, leaders of nationwide interest groups, professionals of national eminence), or are heads of large, complex organizations (legal and/or illegal). Subjects have high quality representation. contacts are also with counterparts in other IRS divisions and with investigators in other agencies (Federal, state, local) and, occasionally, with representatives from the Department of Justice and with IRS Intelligence personnel at higher levels.

B. Purpose. Contacts are to obtain information relevant to alleged tax violations through interrogation, interview, and examining books and records. Intelligence Division representatives from higher levels and Department of Justice representatives are kept apprised of the progress of investigations in which they have a particular interest (e.g., cases on narcotics traffickers). Other investigators are contacted to exchange information, within the constraints of the law. Contacts with IRS counterparts are primarily for the purpose of planning and conducting joint investigations or for evaluating highly complex cases referred to the Intelligence division by other IRS divisions. Incumbent may function as the

leader of a team work assignment, guiding and coordinating the efforts of other Special Agents and of enforcement personnel from other IRS divisions. Incumbent may serve as a coach for trainee special agents and may be called upon to give technical advice to working level special agents.

V. Enviromental Demands

A. Physical Requirements. Incumbent must be in excellent physical condition in order to perform criminal investigations, do surveillance and undercover work. Physcial requirements are specific and are established by the U. S. Civil Service Commission. Performance of duties requires incidental driving of motor vehicles.

B. Work Environment. Incumbent usually works outside the office. Investigations take incumbent into the environments in which subjects live and work; subjects are from all walks of life, so work environment varies from the best to the worst and is sometimes potentially dangerous. From time to time, may be assigned to assist or otherwise perform work, at his grade level, at locations other than his official headquarters.

Appendix I

From "The Oregonian" Newspaper

Ex-IRS agent put on probation

Norman Eugene Weiler, a former Internal Revenue Service agent in Portland, was placed on five years probation Monday for embezzling $9,710 from the agency.

Before U.S. District Judge James A. Redden imposed sentence, defense attorney Norman Sepenuk told the judge he believed his client had "burned out" on the job. Sepenuk described Weiler as a workaholic who became an alcoholic.

Redden said that in declining to impose a prison sentence he was taking into account the fact that Weiler has multiple sclerosis. he ordered Weiler, as special conditions of probation to abstain from alcohol and gambling, to continue his use of the anti-drinking drug Antabuse and participation in Gambles Anonymous, to repay the stolen money, and to receive mental health counseling.

Weiler, 42, who resigned in April following a 14-year career with the IRS, pleaded guilty in September, sayng, "I converted funds of the U.S. Government to my personal use." He admitted to embezzling money that had been advanced to him for expenses while working on two undercover investigations between March 22, 1982, and March 25 of this year.

Weiler was indicted in June.

From "The Oregonian" Newspaper/April 23, 1983

Ex-IRS agent charged for embezzling funds

A former Portland agent for the Internal Revenue Service was charged Wednesday by a federal grand jury with embezzling $9,710 in cash, which he is alleged to have had in his possession in connection with his job.

Norman Eugene Weiler, 42, of 4311 S. E. 37th Ave., was not arrested and is scheduled to make his first appearance July 11 in U.S. District Court in Portland.

Weiler is accused of converting the money to his own use between March 22, 1982, and March 25, 1983. The indictment does not include any other details, and federal prosecutors and IRS officials declined to discuss the charges.

If convicted, Weiler could receive a maximum penality of five years in prison and a $5,000 fine.

T. Blair Evans, district director for the IRS in Oregon, said the indictment was the result of an investigation by the Internal Security Division of the IRS. Evans said the agency makes every effort to police itself from within in order to retain the public's confidence.

According to information provided by the IRS to the U.S. Attorney's Office in Portland, Weiler resigned in April after a 14-year career with the IRS.

The case against Weiler was presented to the grand jury by Steve Shaw, an assistant U.S. attorney with the Department of Justice's Public Integrity Section in Washington, D.C.

Charles Turner, U.S. attorney for Oregon, said the reason his office did not handle the case was that several lawyers on

his staff either knew Weiler or had represented him in civil cases against the government in which he was named as a defendant.

EXHIBIT I(B)

AFFIDAVIT

United States of America)
) ss.
District of Oregon)

I, MICHAEL J. MANEY, being first duly sworn, depose and say:

That I am a special agent with the Criminal Investigation Division of the Internal Revenue Service assigned to investigate the matters contained in this Affidavit;

That at the present time, a Federal Grand Jury is investigating the wagering tax affairs of TRUMAN L. ADAMS and EDWARD A. LEONARD: that I have been assigned to assist the Grand Jury in this investigtion; [sic] that analysis of records seized from TRUMAN

L. ADAMS on December 8, 1979, reflects that LARRY ARNSBERG is a bettor of TRUMAN ADAMS and EDWARD LEONARD:

That during December of 1979, Special Agent NORMAN E. WEILER, of the Criminal Investigation Division of the Internal Revenue Service, called LARRY ARNSBERG. WEILER stated that he was assisting in the investigation of the wagering tax affairs of ADAMS and LEONARD, and that he wished to interview ARNSBERG in relation to this investigation. ARNSBERG told WEILER that he would not submit to an interview. WEILER told ARNSBEG that in that case, he would be issued a Grand Jury subpoena which would command him to appear and testify before the Grand Jury. ARNSBERG stated that he would not cooperate and that WEILER would have to find him before he could serve such a subpoena.

That information received from relatives and friends of ARNSBERG reflects that ARNSBERG does not have a permanent residence.

That on January 25, 1980, at 12:30 p.m., I left a copy of a Grand Jury subpoena (copy attached) with DOROTHY NELSON at STAN'S SUPERMARKET, 5020 N. E. 82nd, Portland, Oregon. STAN'S SUPERMARKET is a business owned by LARRY ARNSBERG. I also left my business card with NELSON and asked her to have ARSNBERG call me. On February 26, I again interviewed NELSON. NELSON stated that shortly after I left the copy of the subpoena with her, she had talked on the telephone to ARNSBERG. NELSON told ARNSBERG that a subpoena had been left for him as well as a number to call. ARNSBERG told NELSON that he would take care of it. ARNSBERG has not been to the store since January 25, 1980 to pick up the subpoena;

That on February 11, 1980, at 12:30 p.m., I left a copy of this same subpoena and a business card with PAMELA LEDGER at the HOOT OWL MARKET, Portland, Oregon. The HOOT OWL MARKET is a business owned by LARRY ARNSBERG. On February 26, 1980, I talked to LEDGER. LEDGER stated that she had left a copy of the subpoena with the night manager, HARVEY M. SMITH. On February 26, I also interviewed HARVEY SMITH. SMITH stated that shortly after the subpoena had been left at the HOOT OWL MARKET, he had talked on the telephone to LARRY ARNSBERG and that he had advised ARNSBERG that a subpoena had been left for him as well as a number to call. Shortly after that, SMITH sent the copy of the subpoena to STAN'S SUPERMARKET where ARNSBERG maintains an office.

That during the week of February __, 1980, I called a telephone number at a residence frequented by LARRY ARNSBERG. A male, who refused to identify himself, stated that he does see ARSNBERG sporadically. I then identified myself to this individual and gave him my phone number asking that he have LARRY ARNSBERG call me.

That, to date, I have not received a telephone call from ARSNBERG.

That ARNSBERG did not appear before the Federal Grand Jury on February 26, 1980.

MICHAEL J. MANEY
Special Agent

Subscribed and sworn to before me this 27th day of February, 1980, at Portland Ore.

U. S. Magistrate

Appendix K

United States District Court
FOR THE
DISTRICT OF OREGON

Magistrate's Docket No. 80-0295
Case No. _____

UNITED STATES OF AMERICA	)	
	)	
v	)	WARRANT OF ARREST
	)	
LARRY ARNSBERG,	)	
	)	
Defendant.	)	

To U.S. Marshal or other authorized agent

You are hereby commanded to arrest

LARRY ARNSBERG,
here insert name of defendant or description

and bring him forthwith before the nearest available United States Magistrate to answer to a complaint charging him with Failure to Appear before the Federal Grand Jury
here describe offense charged in complaint

in violation of U.S.C. Title, 18, Section 3149.
Bail $500.00
Date February 27, 1980 EDWARD LEAVY
United States Magistrate

RETURN

Received February 27, 1980 at Portland Or, and executed by arrest of Larry Arnsberg at Portland Oregon on Feb 27, 1980

_____
Name

_____
Title

Date Feb 27, 1980

_____ District of _____

By _____, Deputy

RECEIVED
___ 1 1980
CLERK, U.S. DISTRICT COURT
DISTRICT OF OREGON

U.S. DISTRICT COURT
DISTRICT OF OREGON
FILED
APR 4 1980
RO____ CHRIST, CLERK

IN THE UNUITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, vs. LARRY ARNSBERG, Defendant.	NO. 80-295 M ORDER

Defendant's motion to quash warrant of arrest came on regularly for hearing on March 31, 1980, before the Honorable James M. Burns, Chief Judge of the above-entitled Court. Defendant was represented by Stephen L. Wilson, one of his attorneys, and plaintiff was represented by Peter Robinson, one of its attorneys. Oral argument was presented by counsel and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that:

1. Defendant's motion to quash the warrant of arrest is granted.

(drawn line by hand)2. ~~The record of defendant's arrest is expunged.~~

DATED at Portland, Oregon this ____ day of April, 1980.

James M. Burns
Chief Judge, United
States District Court

James E. Bartels
Stephen L. Wilson
Spears, Lubersky, Campbell & Bledsoe
800 Pacific Building
Portland, Oregon 97204
Telephone: 226-6151

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
LARRY ARNSBERG,	)
	)
Defendant.	)

STATE OF OREGON)
: ss
County of Multnomah)

I, LARRY ARNSBERG, being first duly sworn, depose and say that:

1. I am the defendant in the above-captioned case.

2. I make this affidavit in support of my motion to quash the warrant for my arrest dated February 27, 1980.

3. I do not own Stan's Supermarket (Stan's) or the Hoot Owl Market (Hoot Owl). Those grocery stores are owned by Larns Investment Company, Inc. I am an officer and a stockholder in Larns Investment Company, Inc., and my duties included responsibility for the daily operations of Stan's and Hoot Owl in December, 1979 and in January and February, 1980. I live in Portland, have lived in Portland all my life, and have business interests in the Portland area.

4. During December of 1979, I received a phone call from Norman E. Weiler while I was at Stan's Supermarket. After I declined to voluntarily submit to an interview with Mr. Weiler, he told me that I would be issued a Grand Jury subpoena and he asked me if I would wait at Stan's Supermarket to receive

service of the subpoena. I told him that I was very busy that day picking up groceries for Stan's and did not have time to wait for him. I did not tell him that I would not cooperate, or that I would not obey a valid subpoena if I was served with one.

5. On or about January 25, 1980, nearly a month after my conversation with Weiler, Dorothy Nelson, an employee of Stan's Supermarket, told me that federal agents had left a copy of a Grand Jury subpoena with her. I relayed this information to my counsel, who advised me that since the subpoena was not served on me personally, I was not required to obey it.

6. On or about February 11, 1980, Pamela Leger, an employee of the Hoot Owl Market, advised me that another subpoena had been left at that store. I again contacted my counsel, who again told me that I was not required to respond to this subpoena.

7. I did not tell any of the federal agents, including Officers Weiler or Maney, that I would not obey a validly issued and properly served subpoena. I did and I still do, believe that if the federal government wishes to compel my appearance before a Grand Jury it should do so according to the law. The federal agents knew, or with minimal investigation could have learned, that I was present at Stan's nearly every day in December, 1970 and January and February, 1980. Stan's is the main store owned by Larns Investment Company, Inc., and I have my office there. Between January 25, 1980 and February 27, 1980 I was at Stan's nearly every day. I also, during that period, made frequent visits to the Hoot Owl. I made no attempt to conceal myself from the agents.

8. On February 27, 1980, when I went to the Hoot Owl to stock groceries, Miss Ledger informed me that two federal agents

had just visited the Hoot Owl Market, asked for me, and left. I began putting away groceries at the Hoot Owl when I received a call from Michael Maney. He said he wanted to meet with me. I told him I was putting up groceries and did not know how long I would be there. He said "your're asking for a lot of trouble" and hung up. I then learned Maney had just left Stan's. I called Maney's office and was told he was not in but he had a phone in his car. I asked to have him call me at the Hoot Owl. Shortly thereafter, agents Maney and Weiler entered the Hoot Owl Market. Agent Maney announced that I was under arrest. He searched me, handcuffed me, marched me through the Hoot Owl in handcuffs in front of my customers, and told me I was being transported to Salem. After speaking with my counsel, the agents agreed to take me before a U. S. Magistrate for a hearing.

9. I have always been and remain willing to obey a properly served and valid subpoena. I do not think it is too much to ask the government to abide the law [sic] before arresting a citizen who has committed no crime and who has always been willing to comply with a lawful subpoena. I ask that this arrest warrant be quashed and the record of my improper arrest expunged.

DATED this 12th day of March, 1980.

_____
Larry Arnsberg

SUBSCRIBED AND SWORN to before me this 12th day of March, 1980.

_____
Notary Public for Oregon
My Commission Expires:

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	No. 80-295M
LARRY ARNSBERG, Defendant.	)	Portland, Oregon Wednesday, February 27, 1980

REPORTER'S TRANSCRIPT

Before: HONORABLE EDWARD LEAVY,
United States Magistrate.

Appearances: PETER ROBINSON,
Assistant U. S. Attorney
for the Government.

JAMES BARTELS, Attorney at Law,
for the Defendant.

(Wednesday, February 27, 1980--
4:50 p.m.)

MR. BARTELS: This is Larry Arnsberg, Your Honor. You issued the arrest warrant for failure to appear before the Grand Jury. I don't see anybody from the U.S. Attorney's officer here.

THE COURT: Okay. I presume that the U.S. Attorney is aware at this time?

MR. BARTELS: Peter Robinson told us to be here at this time. I expected him to be here.

Your Honor, could I talk with Larry for just a minute?

THE COURT: You are representing him?

MR. BARTELS: I'm representing Mr. Arnsberg.

THE COURT: Yes, you can.

(Brief pause.)

MR. ROBINSON: Your Honor if we could begin with the first appearance.

THE COURT: Yes.

MR. ROBINSON: This is United States versus Larry Arnsberg. Would you please come forward at the counsel table?

Your Honor may recall that the court issued a warrant of arrest for Mr. Arnsberg for failure to appear at the Grand Jury. And he was arrested late this afternoon by the IRS Special Agent Meany, [sic] who was there at the time of the arrest, and this is his appearance on that warrant. What I would ask the Court to do is to release him on his own recognizance, if he is willing to abide by the recognizance requirements, and ask the Court to order him to appear on March 26th at 9:00 a.m. at the Federal Grand Jury, and advise him of the consequences of his failure to appear at that time.

THE COURT: March --

MR. ROBINSON: 26th, 9:00 a.m.

THE COURT: You represent the Defendant?

MR. BARTELS: Yes, Your Honor, Jim Bartels representing Mr. Arnsberg, and my -- the first thing I'd like to point out to the court is that I don't believe that Mr. Arnsberg was ever subpoenaed, so the arrest warrant should never have been issued, and I'd like to see the affidavit that the agent used to obtain the arrest warrant. So far I haven't see it.

(Baliff handing.)

MR. BARTELS: The affidavit shows on its face that Mr. Arnsberg was never personally subpoenaed, and I don't think the arrest warrant should have been issued, and I think it should be revoked.

THE COURT: That is not my understanding of the law, that service of a subpoena in advance of the issuance of a warrant is necessary. If you want me to rule on that right now, I would deny your request. If you want to develop it further --

MR. BARTELS: Well, it is my understanding that Mr. Arnsberg was arrested because he failed to appear pursuant to a subpoena. Now, if the subpoena was invalid, then --

THE COURT: Well, what is your motion?

MR. BARTELS: Well, I'd request that the Court just simply remove the arrest warrant, revoke the arrest warrant, because it was invalid and if you need further evidence on that, I'd be happy to cross examine the agent --

THE COURT: Further evidence to what effect?

MR. BARTELS: That Mr. Arnsberg was never subpoenaed.

THE COURT: The affidavit doesn't say that he was, does it?

MR. BARTELS: The affidavit says that it was left with a person who was employed by him, and that is not the case.

THE COURT: Well, what are you going to -- I don't --

MR. BARTELS: I propose to demonstrate, Your Honor, that the persons with whom the subpoena are left are not employed by Mr. Arnsberg. They are not his agents, they don't have authority to accept service of subpoena with him, and leaving the paper had no effect on Mr. Arnsberg. They are employed by a corporation of which Mr. Arnsberg is a shareholder, but they are not employed by him.

THE COURT: I want to make it clear to you, I don't want to hear a debate, and I want you to say what you want me to do, and I want you to offer in support of what you are asking me to do.

MR. BARTELS: I'm asking you to revoke the arrest warrant, and if you are not willing to do that I'd like Mr. Arnsberg released on recognizance.

THE COURT: Your first motion is denied. Now, I'll hear you on his release.

MR. BARTELS: Well, I'd like him released on recognizance. If the arrest warrant is valid, I have to admit I'm at a bit of a loss, because I don't think it was valid, and I'd like him just released outright.

THE COURT: That's denied.

MR. BARTELS: Okay.

THE COURT: All right.

MR. BARTELS: Then I'm willing to have him released on recognizance, but I don't think that it is appropriate to use this technique to compel him to appear at a Grand Jury hearing when he has never been subpoenaed for the hearing. I don't think that the Government can go out and arrest someone and, as a term of their release on recognizance, require them to appear at a Grand Jury hearing, when they failed to

subpoena him for the hearing. It just, to me, is a -- going through the back door. If they wanted Mr. Arnsberg to appear at the hearing, they could have subpoenaed him.

He is a business man here in the Portland area. He is an officer of a corporation that owns a couple of grocery stores. Could I take one short break and just ask Mr. Arnsberg something?

THE COURT: Yes.

(Short recess.)

MR. BARTELS: Mr. Arnsberg is willing, if he is properly subpoenaed, to appear at the Grand Jury hearing. I haven't checked the date with him, but March 26th, as far as I know, is all right. But I really, just object to the way the Government has gone about this.

THE COURT: Well, now, there is only a limited -- there is only limited choices that the Court has. The Court can dismiss the whole thing, and I've already denied your motion to do that. Okay? I've denied that.

MR. BARTELS: I understand that.

THE COURT: The next thing is, the Government has asked that the Court release him on his own recognizance and ordered him to appear on March 26th at 9:00 a.m. Do you oppose that?

MR. BARTELS: Yes, he is willing to do that.

THE COURT: All right. That is allowed. Now, I recognize that your motion to dismiss the whole thing is hastily made, and the Court's response to it is hasty. If you want to develop that further, I'll give you leave to do so. You can file a motion and support it with some briefing on the law, and it may be that you are right. But my

belief is that you are not. And that's why I ruled against you on this occasion. But it will be the order of the Court that the Defendant be released on his own recognizance and that he appear as a witness before the Grand Jury on March 26th at 9:00 a.m.

Now, failure to do that will constitute contempt and will be dealt with accordingly. In the meantime, for whatever reason you want to attack this, you have leave to.

MR. BARTELS: Now, it is my understanding that if Mr. Arnsberg appears March 26th at the Grand Jury hearing, then that is the end of this?

THE COURT: That is all the Government is asking, is it not?

MR. ROBINSON: That's correct, Your Honor.

MR. BARTELS: Okay.

THE COURT: Now, I'll be honest to say that I'm not going to tell this Defendant he has a right to remain silent. Because it is adequate to me that he is represented by counsel, that he is ultimately destined to be a witness. And that's inconsistent with any right to remain silent.

MR. BARTELS: He is ultimately what?

THE COURT: Destined to be a witness. If he has a right to remain silent, it is per force of some circumstance that I'm not going to tell him about, because I don't know anything about it.

MR. BARTELS: I understand that appearing before the Grand Jury doesn't mean he has to testify, if that would violate any other right he has.

THE COURT: That's pure speculation. I'm not going to advise him of it, because I don't know what rights he has. He has no more rights than the rest of us. Okay.

That's all--I'm not going to start reciting any right to remain silent, and then have him go in there and say to that Grand Jury, "That judge told me I could remain silent." Do you want him further advised?

MR. ROBINSON: No, I think that the advice has been fine, Your Honor. Ordinarily, I think that the Defendant would be processed by the Marshals; because of the late hour, I'd ask that he be processed when he comes in on the 26th. If he wants to do that, otherwise, we will have to require him to remain until we can assemble the Marshall's staff to process him.

THE COURT: He can appear on the 26th.

MR. BARTELS: Where is the Grand Jury?

MR. ROBINSON: It is on the Fourth Floor of this building, across from the Marshall's Office.

THE COURT: And what he is asking is that he be fingerprinted and photographed on that occasion.

MR. BARTELS: We do accept your invitation to -- for leave to file further motion.

THE COURT: All right. Now, wait a minute, I want to limit my responsibility here. I didn't invite it. I give you leave to do as you choose, and I want to be careful that I'm not soliciting or suggesting or anything else. I'm telling you, I'm here, and because I deny it doesnt' mean that you don't get to renew it, if you choose to.

MR. BARTELS: I didn't mean to be inartful in the language I used, Your Honor.

THE COURT: All right. I just want to be clear that each of us have our responsibilities. You do as you choose.

(Matter concluded.)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

I, Joniel A. Edmonds, an Official Court Reporter of the United States District Court, for the District of Oregon, do hereby certify that I reported in Stenotypy the proceedings occurring in the transcript appended hereto; that I thereafter caused my Stenotype notes, so taken, to be reduced to typewriting under my direction; and that the foregoing and hereto attached pages of typewritten matter, numbers 1 to 9, both inclusive, consitutes a full, true and accurate record of said proceedings so reported by me in Stenotypy to the best of my skill and ability, as aforesaid.

Dated at Portland, Oregon on this the 21st day of June, 1982

JONIEL A. EDMONDS
Official Court Reporter

A-157

Supreme Court, U.S.
FILED
DEC 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-596

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. ARNSBERG, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
BARBARA L. HERWIG
FRANK A. ROSENFELD
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

21

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, IRS special agents may be held personally liable, under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), for executing an arrest warrant that was subsequently held to be invalid.

2. Whether the agents' execution of the warrant constituted a state-law tort, thus rendering the United States liable under the Federal Tort Claims Act.

3. Whether, absent a waiver of sovereign immunity, the United States may be held directly liable for damages under *Bivens*.

4. Whether the Federal Tort Claims Act constitutes a waiver of the sovereign immunity of the United States with respect to constitutional torts under *Bivens*.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-596

ROBERT L. ARNSBERG, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A42) is reported at 757 F.2d 971. The opinion of the district court on liability (Pet. App. A97-A116) is reported at 549 F. Supp. 55. The opinion of the district court on damages (Pet. App. A91-A96) is unreported.

JURISDICTION

The opinion of the court of appeals, as modified on rehearing, was issued on April 9, 1985. A subsequent petition for rehearing was denied on May 30, 1985

(Pet. App. A43-A44). The judgment of the court of appeals was entered on June 10, 1985 (Pet. App. A88-A89). The petition for a writ of certiorari was filed on August 27, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner contends that two special agents of the Internal Revenue Service committed a state-law tort and violated his Fourth Amendment rights in executing an arrest warrant that was subsequently found to be invalid. On that basis, he seeks damages from the agents in their individual capacity under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), and from the United States under both *Bivens* and the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.* The court of appeals held that summary judgment should be granted in favor of the agents and the United States in all respects.

1. Petitioner's name arose in connection with an IRS investigation into gambling activities in Portland, Oregon. Respondents Maney and Weiler, IRS special agents involved in the investigation, sought to obtain information from petitioner voluntarily, but petitioner declined to testify unless he was subpoenaed by a grand jury and stated that the agents would have to find him in order to serve a subpoena. In December 1979, the grand jury issued a subpoena requiring petitioner to appear on February 26, 1980. Despite their efforts, however, the agents were unable to serve this subpoena on petitioner, and petitioner did not appear before the grand jury on February 26. Pet. App. A4-A5, A129-A133.

Accordingly, the agents consulted the United States Attorney's office and explained the difficulties they

had encountered. Assistant United States Attorney Robinson concluded that a warrant should be obtained for the arrest of petitioner as a material witness pursuant to 18 U.S.C. 3149.[1] Pet. App. A5-A6. Based on an affidavit submitted by Agent Maney (*id.* at A129-A133), Robinson obtained an arrest warrant from a United States magistrate on February 27, 1985. The magistrate determined that the requirements for a material witness arrest warrant had been satisfied (*id.* at A6). However, although he correctly cited 18 U.S.C. 3149 as the statutory basis for the warrant, the magistrate, in describing the offense charged in the supporting affidavit, referred to a charge of failure to appear before the grand jury (Pet. App. A134). The agents later executed the warrant and arrested petitioner (*id.* at A7). Thereafter, petitioner successfully moved to quash the arrest warrant as invalid (*id.* at A136-A137).

2. After exhausting his administrative remedies under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, petitioner brought this action in the United States District Court for the District of Oregon. Contending that his arrest pursuant to the invalid warrant was both tortious under Oregon law and violative of the Fourth Amendment, petitioner sought damages from the individual agents under *Bivens* and from the United States under *Bivens* and the FTCA, 28 U.S.C. 2680(h).

On cross-motions for summary judgment, the district court granted judgment for the agents on the *Bivens* claim because they acted in good faith and thus were entitled to qualified immunity (Pet. App.

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[1] This provision, with minor changes not here relevant, is now codified at 18 U.S.C. (Supp. II) 3144.

A113-A115).[2] However, concluding that the arrest warrant was defective because of the absence of probable cause to believe that petitioner's presence could not be secured by subpoena (*id.* at A109-A112), the court ruled that petitioner's arrest was a state-law tort for which the United States was liable under the FTCA (*id.* at A107-A109); since this state-law tort gave rise to FTCA liability against the United States, it was unnecessary for the court to consider whether the United States could be directly liable under *Bivens* or whether the FTCA waived the government's sovereign immunity for constitutional torts. In a later opinion, the court awarded damages of $6,650 from the United States (*id.* at A91-A96).

3. On cross-appeals, the court of appeals affirmed the district court's grant of summary judgment in favor of the agents, and it reversed the summary judgment against the United States and ordered that judgment be entered for the government (Pet. App. A1-A42).

With respect to the *Bivens* claim against Agents Maney and Weiler, the court of appeals held that although the arrest warrant was in fact invalid because it failed to show probable cause that petitioner's grand jury appearance could not be obtained by subpoena (Pet. App. A12-A13), the agents had not acted unconstitutionally in executing it (*id.* at A28-A32). The court rejected petitioner's arguments that the agents should have known that the warrant was not

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[2] The district court's opinion was issued shortly after this Court's decision in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). The district court, apparently applying pre-*Harlow* law, found that the agents had established their good faith and were entitled to summary judgment on their defense of qualified immunity (Pet. App. A113-A115).

validly issued in the circumstances of this case and should not have executed the warrant because of the facial discrepancy concerning the offense charged. Finding that the agents had "reasonably relied on the advice of counsel that the arrest was constitutional, and on the issuance of a warrant by a magistrate" (*id.* at A3), the court explained that it would be "plainly unreasonable" to require the agents to "take issue with the considered judgment of an assistant United States Attorney and the federal magistrate" and "at their own risk second-guess the legal assessments of trained lawyers" on questions of probable cause as to which "[r]easonable attorneys could disagree" (*id.* at A29-A30). The court also reasoned that the Constitution neither was violated by a facial discrepancy that was "not * * * serious" (*id.* at A30) nor "demand[ed] that arresting officers regularly scrutinize warrants for such technical discrepancies" (*id.* at A31). In addition, the court determined that the agents were entitled to qualified immunity both under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), because they had not violated a clearly established constitutional standard, and under pre-*Harlow* law, because they had reasonably believed in good faith that the arrest pursuant to the warrant was constitutional (Pet. App. A32-A34, A41-A42 n.10).

The court of appeals further held that petitioner was not entitled to damages from the United States. The court first ruled that the United States was not liable to petitioner under the FTCA for the alleged state-law tort.[3] Recognizing that 28 U.S.C. 2680(h) imposes liability on the government for false arrest or false imprisonment only "with regard to acts or

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[3] The court of appeals assumed but did not decide that petitioner's arrest was a tort under Oregon law (Pet. App. A15).

omissions of investigative or law enforcement officers of the United States Government,"[4] the court found that the IRS agents, as the "investigative or law enforcement officers" here, were not responsible for the invalid warrant on which the alleged tort was based. As the court explained (Pet. App. A21-A24), the uncontroverted facts showed that the agents had "acted nearly perfectly" in making "diligent attempts" to serve the subpoena on petitioner, in reporting to the United States Attorney's office the difficulties they encountered, and in submitting "an accurate affidavit to the magistrate";[5] that the discrepancy in the warrant concerning the offense charged was "a relatively minor and a relatively technical one," and the law did not "impose upon law enforcement officers like Weiler and Maney the obligation of scrutinizing arrest warrants for such minor discrepancies"; and that the agents "acted properly under the general common law." Rather, "the facts show that * * * [it was the magistrate who] made an erroneous determination of probable cause and thereby caused [petitioner] to be subject to an unreasonable seizure" (*id.* at A26). Concluding that "the district court erred in failing to limit its inquiry to whether the government law en-

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[4] Section 2680(h) defines "investigative or law-enforcement officer" to mean "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."

[5] The court rejected petitioner's contention that the affidavit was misleading, finding that it had "no such misleading tendency" (Pet. App. A22). In particular, the court found (as defense counsel and the magistrate had recognized, see *id.* at A147-A148) that the affidavit "made clear that the agents had not previously served the subpoena on [petitioner]" (*id.* at A22) and did not suggest that petitioner had a duty to appear before the grand jury in the absence of a subpoena.

forcement officers * * * acted tortiously," the court of appeals held that in this case those officers "committed no tort under Oregon [l]aw" (*id.* at A25). Accordingly, it ordered that summary judgment be entered for the government on this issue (*ibid.*).

Moreover, the court of appeals upheld the district court's ruling that the doctrine of sovereign immunity precluded the imposition of liability directly on the United States for constitutional torts (Pet. App. A25-A28). Although assuming that the United States would be liable under such a theory for the magistrate's legal error in issuing the arrest warrant (*id.* at A26), the court concluded that *Bivens* could not be extended to provide a cause of action against the United States in light of the government's sovereign immunity (*id.* at A27). The court did not decide whether the FTCA applies to constitutional as well as state-law torts, thus waiving the sovereign immunity of the United States with respect to such constitutional violations (*id.* at A35-A36 n.2).[6]

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[6] In its initial opinion, the court of appeals had concluded that there was a genuine issue of material fact as to whether the IRS agents had made deliberate misrepresentations to the Assistant United States Attorney and the magistrate; accordingly, it had remanded the case to the district court for further proceedings on both the *Bivens* claim against the agents and the FTCA state-law tort claim against the United States (Pet. App. A70-A71, A80). However, in response to respondents' petition for rehearing, the court revised its opinion and judgment; finding that the uncontroverted record provided no support for the assertion of deliberate misrepresentation, the court directed that judgment be entered for respondents on all counts (*id.* at A21-A22, A31-A34).

ARGUMENT

1. The district court rejected petitioner's *Bivens* claim against the individual respondents, holding that the agents were entitled to qualified immunity. The court of appeals agreed, and further concluded that the agents had committed no Fourth Amendment violation.

Petitioner asserts (Pet. 16-22) that the courts below misunderstood the factual record and that, as properly understood, it demonstrates that the agents were not entitled to qualified immunity because they acted in bad faith and their conduct violated clearly established constitutional standards. Petitioner's fact-bound contention does not warrant this Court's review, however, and in any event, for the reasons stated by the courts below, it is without merit. Indeed, both courts below were in agreement that the record was sufficiently clear and uncontroverted to justify summary judgment against petitioner in this regard.

As the court of appeals observed (Pet. App. A22), the IRS agents in this case "acted nearly perfectly." After their "diligent attempts" (*ibid.*) to serve the subpoena on petitioner proved unsuccessful, the agents consulted the United States Attorney's office and "accurately recounted the difficulties they [had] encountered" (*id.* at A32). An Assistant United States Attorney concluded that an arrest warrant was justified (*id.* at A6, A32), and pursuant to the Assistant's directions one of the agents submitted an "accurate affidavit" to the magistrate (*id.* at A22).[7] In subse-

[7] Petitioner's complaints about the accuracy of the affidavit were correctly rejected below. For example, Agent Maney's statement that petitioner "did not appear before the grand jury" does not imply that petitioner had any duty to appear;

quently executing the warrant issued by the magistrate, the agents were entitled to rely on the determinations by the magistrate and the Assistant United States Attorney that probable cause existed to arrest petitioner as a material witness (*id.* at A3); especially where, as here, "[r]easonable attorneys could disagree" on the question of probable cause (*id.* at A29), there is no requirement that agents "take issue with the considered judgment of an assistant United States Attorney and the federal magistrate" and "at their own risk second-guess the legal assessments of trained lawyers" (*id.* at A29-A30). Nor was the agents' conduct rendered unreasonable by the fact that the warrant contained a discrepancy between the statutory citation to the material witness arrest provision and the description of the offense as failure to appear before the grand jury; as the court of appeals correctly stated, this discrepancy was "minor" and "technical" (*id.* at A23; see also *id.* at A30), and "it is not constitutionally required * * * that arresting officers regularly scrutinize warrants for such technical discrepancies" (*id.* at A31).[8]

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on the contrary, the affidavit sets forth the agents' repeated but unsuccessful efforts to serve a subpoena on petitioner, and the magistrate surely understood, as he later expressly stated (Pet. App. A148), that petitioner had not been served. Agent Maney's statement that petitioner "would not cooperate" was also justified in light of petitioner's insistence on a subpoena rather than voluntary acceptance of a more informal arrangement and the agents' inability to locate petitioner for service of the subpoena even though their extensive efforts plainly afforded him reasonable notice that he was being sought. Finally, the statement that petitioner had not been to his store in a month was a fair conclusion based on the explanations that petitioner's employees gave the agents for his absence.

[8] *Malley* v. *Briggs*, No. 84-1586 (argued Nov. 13, 1985), presents the question whether a police officer who obtains an

Petitioner further argues (Pet. 14-16) that this Court should overturn its recent decision in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), to restore, at least in certain circumstances, the subjective "good faith" requirement for qualified immunity that existed prior to *Harlow*. However, petitioner has offered no reason for the Court to revisit this question or to reject the analysis that it unanimously adopted only four Terms ago.[9] See also *Mitchell* v. *Forsyth*, No. 84-335 (June 19, 1985), slip op. 18. And in any event, as the concurrent findings below establish, the agents here acted in good faith under the pre-*Harlow* standard (see page 4 note 2 & page 5, *supra*).

2. Petitioner also appears (Pet 18-24) to seek review of the court of appeals' holding that the United States was not liable under the Federal Tort Claims Act for the alleged state-law tort. Petitioner does not contest the court's ruling that, pursuant to the express language of 28 U.S.C. 2680(h), the United States is subject to liability for such torts only if they arise out of the "acts or omissions of investigative or law enforcement officers of the United States Government." See also *Ames* v. *United States*, 600 F.2d 183, 185 & n.3 (8th Cir. 1979); *Jaffee* v. *United States*,

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arrest warrant from a judge is subject to liability for executing the warrant on the ground that he knew or should have known that the facts recited in his affidavit did not establish probable cause. Because in the instant case the court of appeals held that the agents neither knew nor reasonably could have been expected to know that the warrant was invalid, this petition need not be held pending decision in *Malley* v. *Briggs*.

[9] We agree with petitioner (Pet. 15) that *Harlow* does not afford qualified immunity for violations of clearly established Fourth Amendment rules. But for the reasons already outlined, that proposition has no application to the present case.

592 F.2d 712, 716 n.6 (3d Cir.), cert. denied, 441 U.S. 961 (1979). Rather, focusing on the conduct of the IRS agents, petitioner argues that "[t]he same facts which defeat the good faith immunity of the agents also show that the agents acted tortiously" (Pet. 22).

For the reasons already discussed, petitioner's argument is without merit and does not call for further review. Even assuming that the warrant was not supported by probable cause and that petitioner's arrest pursuant to an invalid warrant was tortious under Oregon law (see Pet. App. A15), the dispositive fact is that the IRS agents acted properly and were not responsible for the tort. Rather, it was the "[m]agistrate * * * [who] made an erroneous determination of probable cause" in issuing the warrant (*id.* at A26). Because the alleged tort was not committed by the agents, the United States is not liable under Section 2680(h).

3. Petitioner also argues (Pet. 28-35) that under *Bivens* the United States should be directly liable in damages for violations of the Fourth Amendment. However, as the court below and other courts of appeals have recognized (see Pet. App. A27-A28),[10] principles of sovereign immunity prevent the United States from being sued without its consent. See, *e.g.*, *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983);

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[10] See also *Keene Corp.* v. *United States*, 700 F.2d 836, 845 n.13 (2d Cir.), cert. denied, 464 U.S. 864 (1983); *Radin* v. *United States*, 699 F.2d 681, 684-685 (4th Cir. 1983); *Laswell* v. *Brown*, 683 F.2d 261, 268 (8th Cir. 1982), cert. denied, 459 U.S. 1210 (1983); *Jaffee*, 592 F.2d at 717-718.

United States v. *Testan*, 424 U.S. 392, 399-401 (1976).[11]

It is specious to argue, as petitioner does, that sovereign immunity is inapplicable where the government has exceeded its authority by acting unconstitutionally; that argument would essentially eviscerate the doctrine of sovereign immunity (cf. *Barr* v. *Matteo*, 360 U.S. 564, 572 (1959)) and has been rejected as a limitation on the immunity of the United States from suit. See *Butz* v. *Economou*, 438 U.S. 478, 504 (1978); *United States* v. *Hopkins*, 427 U.S. 123, 130 (1976). Indeed, in *Testan*, the Court stated that not "all substantive rights of necessity create a waiver of sovereign immunity" (424 U.S. at 401) and that such a waiver must be found even where "the basis of the federal claim * * * [is] the Constitution" (*ibid.*). Likewise, *Testan* also rejected the argument suggested by petitioner here (Pet. 34-35) that the Court should "tamper with these established principles [of sovereign immunity] because it might be thought that they should be responsive to a particular conception of enlightened governmental policy" (424 U.S. at 400). Finally, the availability of monetary relief under the Tucker Act (28 U.S.C. 1346(a)(2), 1491)

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[11] Petitioner contends (Pet. 11, 28 n.4) that there is a conflict among the circuits on the issue whether the Fourth Amendment establishes a cause of action for damages against the United States. However, the cases on which he relies involve the question of suits for constitutional torts under the Federal Tort Claims Act (by which the government has waived sovereign immunity), not a direct claim under the Constitution regardless of sovereign immunity. We discuss the FTCA question at pages 13-16, *infra*; as to the constitutional issue, the court of appeals correctly noted (Pet. App. A27-A28) that the circuits are in accord in holding that the Fourth Amendment does not provide a direct damages action against the United States.

and the Just Compensation Clause of the Fifth Amendment does not, contrary to petitioner's argument (Pet. 33-34), establish that other constitutional provisions render the United States liable for damages irrespective of sovereign immunity; the Court so held in *Testan*, relying on the unique nature of the Just Compensation Clause in terms of its specific "language" and "purpose" requiring compensation and its "self-executing aspects" (424 U.S. at 401).

4. As demonstrated above, petitioner does not have a cause of action against the United States either under the Federal Tort Claims Act for the alleged state-law tort or directly under the Constitution for the violation of his Fourth Amendment rights. In an effort to circumvent the effect of those conclusions, petitioner argues (Pet. 24-27) that the 1974 amendment to 28 U.S.C. 2680(h) waives the government's sovereign immunity for constitutional torts and therefore that the United States is liable for the Fourth Amendment violation in this case.[12]

As petitioner acknowledges, this argument was squarely rejected in *Brown* v. *United States*, 653 F.2d 196, 199-201 (5th Cir. 1981), cert. denied, 456 U.S. 925 (1982). See also *Castro* v. *United States*, 775 F.2d 399, 405 (1st Cir. 1985); *Art Metal—U.S.A., Inc.* v. *United States*, 753 F.2d 1151, 1160 (D.C. Cir.

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[12] Of course, waivers of sovereign immunity must be strictly construed and may not be "enlarge[d] * * * beyond what the language requires." *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686 (1927). Rather, "statutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign." *McMahon* v. *United States*, 342 U.S. 25, 27 (1951) (footnote omitted). "The appropriate inquiry * * * is whether Congress clearly and unequivocally" waived sovereign immunity. *Lehman* v. *Nakshian*, 453 U.S. 156, 162 (1981).

1985); *Birnbaum* v. *United States*, 588 F.2d 319, 327-328 (2d Cir. 1978); Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 Harv. J. on Legis. 1, 4-5 (1979); cf. *Sellfors* v. *United States*, 697 F.2d 1362, 1365 (11th Cir. 1983), cert. denied, No. 82-1778 (July 2, 1984). Petitioner contends, however, that *Brown* is in conflict with *Norton* v. *United States*, 581 F.2d 390, 394-395 (4th Cir.), cert. denied, 439 U.S. 1003 (1978). For the reasons stated in our brief in opposition in *Brown* (No. 81-1200 (1981 Term)), a copy of which is being sent to counsel for petitioner, we submit that the decision in *Brown* is correct [13] and does not conflict with *Norton*.[14]

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[13] As discussed in our opposition in *Brown*, the 1974 amendment to Section 2680(h) was intended "to provide a remedy against the United States for the intentional torts of its investigative and law enforcement officers." S. Rep. 93-588, 93d Cong., 1st Sess. 1 (1973); see also *id.* at 3. As the Senate Report indicates, that remedy extends to intentional torts that are also violations of the Fourth Amendment. At the same time, the 1974 amendment, which the Department of Justice did not oppose (*id.* at 4), does not establish that the United States would be liable for constitutional violations that are *not* also state-law torts. On the contrary, 28 U.S.C. 1346(b) and 2674, which are incorporated by reference in the 1974 amendment (see 28 U.S.C. 2680(h)), specifically provide that the United States is liable only if a private person would be liable under the circumstances (see *United States* v. *Muniz*, 374 U.S. 150, 153 (1963)) in accordance with the law of the place where the tortious conduct occurred (see *Carlson* v. *Green*, 446 U.S. 14, 23 (1980)). Since a private party cannot violate the Constitution, and since state law provides the governing legal standard for liability, these statutory provisions make clear that the United States is not liable for a constitutional violation that is not a tort under local law.

[14] The "sole issue" in *Norton* was whether under the FTCA the United States could assert the immunity of its officials as

The issue of the applicability of the FTCA to constitutional torts and the asserted conflict between *Brown* and *Norton* were expressly presented in the petition for a writ of certiorari in *Brown*; the Court denied certiorari in *Brown*, and there is no reason for a different result here.[15]

Indeed, review would be particularly inappropriate in the circumstances of this case. First, neither court below addressed the matter (see Pet. App. A35-A36 n.2). Moreover, whatever kinds of torts are encompassed within Section 2680(h), that provision is ex-

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a defense to its own liability (581 F.2d at 391; see also *id.* at 393). In fact, the government did not contest the applicability of Section 2680(h) to the Fourth Amendment violation involved in that case (581 F.2d at 392). However, in describing the government's concession that Section 2680(h) was applicable there, the court commented that the 1974 amendment to that provision was "intended to waive the federal government's sovereign-immunity defense in suits brought to redress violations of the fourth amendment committed by federal law enforcement officers" (581 F.2d at 392-393; see also *id.* at 394-395 & n.8). It is that statement—which does not even refer to the issue of constitutional violations that are not also state-law torts—that is alleged by petitioner to conflict with *Brown*.

[15] We also note that Congress has considered bills to make the United States liable for constitutional torts. These bills reflect the settled understanding that Section 2680(h) does not extend beyond state-law torts and thus does not impose liability on the government for constitutional violations that are not also tortious under state law. See, *e.g.*, 125 Cong. Rec. 5274 (1979) (remarks of Sen. Kennedy); *Tort Claims: Hearing on H.R. 24, H.R. 3060, and H.R. 3799 Before the Subcomm. on Administrative Law and Governmental Operations of the House Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. 23, 24, 32 (1982) (statement of Deputy Attorney General Schmults); Bell, *supra*, 16 Harv. J. on Legis. at 10, 16.

pressly limited to those torts committed by "investigative or law enforcement officers of the United States Government." Since the constitutional violation here arose from the erroneous legal determination of probable cause by the magistrate and not from the acts of the IRS agents, liability could not be imposed on the United States regardless of whether Section 2680(h) subsumes constitutional torts as such, and hence the outcome of this case would be unaffected by the resolution of the issue that petitioner seeks to present.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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REPLY BRIEF OF THE PETITIONER

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REPLY OF THE PETITIONER

ARGUMENT IN REPLY

1.

The importance and timeliness of the immunity and summary judgment issues raised here was recently underscored in, Note, Qualified Immunity of Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation, 95 Yale L. J. 126 (Nov. 1985). The author of this note anticipated the nature of the problem presented in this case:

> A literal application of Harlow [v. Fitzgerald, 457 U.S. 800 (1982)] thus permits an official to be granted qualified immunity as a matter of law even though the principal disputed question of fact in the case--the true purpose or intent motivating the official's conduct--remains unresolved. More accurately, the principal disputed question of fact, which forms the basis of the substantive claim, is subsummed by the legal immunity inquiry and implicitly resolved by the Court against the plaintiff when it concludes, on the basis of nothing more than the official's pretextual assertions, that the allegedly unconstitutional conduct controvened no clearly established law. Id., 138.

Contrary to Respondents' Brief at page 8, we do not assert that the Court below "misunderstood the factual record." We assert that the Court improperly found there was no genuine issue as to any material fact. To reach this erroneous conclusion, the Court improperly made findings which resolved in material factual issues in favor of respondents. Our point is that it is not the business of Courts of Appeals to make findings of fact. The task of the Court below

was to determine whether a genuine issue of material fact existed.

Any argument on this question must necessarily be "fact bound" in a sense (Respondents' Brief, page 8), but the facts are cited to show the existance of a genuine material issue, not to persuade this Court that petitioner's interpretation of the facts is correct. Petitioner seeks to have these issues tried in the proper forum.

Although the questions involving Rule 56, Federal Rules of Civil Procedure alone may no longer present issues which this Court should review, this case involves much more. The factual problem here is whether, under Harlow v. Fitzgerald, 457 U.S. 800 (1982), summary judgment was desirable. This inquiry involves not only the more familiar summary judgment issues, but also the evolution of the Harlow objective standard of good faith immunity.

This Court has repeatedly said that summary judgment should be used to protect government agents from frivolous claims. E.g., 457 U.S. at 8-819. Nevertheless, this Court and the Congress have both held that where the claim is not frivolous, a citizen whose Fourth Amendment rights are violated has a remedy under 28 U.S.C. §2680(h) or Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) or both. The balance of those two important interests (the protection of government agents from frivolous claims and the protection of citizen's Fourth Amendment rights) is at the center of the Harlow standard. The scope of the protection of government agents by the use of summary judgment is at the center of this case.

The relative completeness of the record in this case and the strength of the competing interests on both sides in this case (the clearly erroneous arrest of an innocent citizen versus the need to protect the agents from harassing

litigation) make this a good opportunity to further refine Harlow immunity standard, particularly where it conflicts with Rule 56 of the Federal Rules of Civil Procedure. See, 95 Yale Law Journal at 140.

One issue of material fact in our case is this: Respondents' claim that the erroneous arrest was the result solely of a mistake of the United State Magistrate (who is absolutely immune) in finding probable cause where there was none. Petitioner claims that the agents themselves acted wrongfully in at least two ways. First, in misleading the Assistant United States Attorney and the Magistrate and then in acting on a warrant which they knew, or should, by their training, have known, was improper and not supported by probable cause.

Petitioner's interpretation of the facts is supported, if not compelled, by these uncontroverted facts:

1. The same agents who tried and failed to serve Arnsberg with the subpoena also arrested Arnsberg with the warrant isued for "failure to appear."

2. The agents were trained and experienced in serving subpoenas.

3. The agents were trained and experienced in making arrests.

4. The agents' job description and the law required them to know the law governing their conduct.

Respondents' interpretation of the facts, we suppose, will be supported by testimony that the agents relied on the Assistant United States Attorney and the Magistrate in executing the warrant. However, that subjective testimony is lacking in credibility when confronted by the hard facts. A genuine issue of material fact exists.

Perhaps it would be possible for a trier of fact to find that the agents did not act tortously. Certainly, it was not proper for that

determination to be made by way of summary judgment.

Surely, this Court must not have intended Harlow to negate the requirements of Rule 56 of the Federal Rules of Civil Procedure.

2.

A final point in reply is that, while respondents do not find a conflict between Brown v. United States, 653 F2d 196 (5th Cir. 1981) and Norton v. United States, 581 F2d 390 (4th Cir. 1978) (Respondent's Brief at p. 14). The Courts do include the Ninth Circuit Court of Appeals below. E.g., Arnsberg v. United States, 757 F2d 971, 976n2, 978n4 (9th Cir. 1984). This Court should resolve that conflict.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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